

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-362

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
ET AL.,
Appellants,

—v.—

C. R. MANCARI, ET AL.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

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RELEVANT DOCKET ENTRIES

DATE

PROCEEDINGS

- 8-14-72 Filing Complaint.
Summons, original and six copies issued and with copies of complaint attached for service, delivered to the U.S. Marshal.
- 8-14-72 Filing Plaintiffs' Application for Convening Three-Judge Court.
- 8-15-72 Motion of C. R. Mancari, Edward Edwards and Anthony Franco for preliminary injunction.
Filing Affidavits of the following plaintiffs in support of above motion: Anthony Franco, Edward Edwards, C. R. Mancari.
- 8-15-72 Filing Plaintiffs' Points of Law and Authorities in support of their Motion for a Preliminary Injunction.
- 8-21-72 Filing U. S. Marshals Service of Summons on Louis Bruce, Commission of Indian Affairs; Rogers C. B. Morton, Sec. of Dept. of Interior; Richard G. Kleindienst, Attorney General of U.S.; and Victor R. Ortega, U. S. Attorney, on 8/15/72.
- 8-23-72 Filing U. S. Marshals Service of Summons on Walter Olson Area Director, BIA, on 8/22/72.
- 8-28-72 Filing Plaintiffs' Motion for Order granting leave to perform discovery.
- 8-25-72 Filing First Amended Complaint.
Original and six service copies of summons issued and delivered to the marshal for service with service copies of first amended complaint.
- 8-29-72 Filing and entering Order that plaintiffs be granted leave to issue and serve a notice of examination and to proceed thereunder to take testimony of Manny Foster, Jack Anderson and Carl G. McMullan. (Bratton)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8-29-72	<p>Notice of entry given by copy to counsel.</p> <p>Filing Notice to Take Depositions of Manny Foster, Jack Anderson, and Carl G. McMullen.</p>
8-29-72	<p>Filing Marshal's returns of service showing the following persons served on 8-28-72: U. S. Attorney; Rogers C. B. Morton; Lewis Bruce (summons on first amended complaint)</p>
8-31-72	<p>Filing Plaintiffs Brief in Support of Application for a three-judge Court.</p>
9- 1-72	<p>Conference with counsel. Judge Bratton will notify counsel when three judges are designated.</p>
9- 5-72	<p>Filing Marshal's return of service of summons and amended complaint on the following persons and dates:</p> <p>Walter O. Olson, Area Director, BIA-8/30/72</p> <p>Anthony Lincoln, Area Dr. BIA-8/30/72</p> <p>Navajo Area Office</p> <p>Anthony Lincoln, Navajo Area Director, BIA Window Rock, Ariz.-8/30/72</p> <p>Filing return of service on the following subpoenas D/T: Manny Foster, Mr. Carl G. McMullen, and Jack Anderson served 8/29/72.</p>
9- 5-72	<p>Filing Defendants Preliminary Memorandum in Opposition to Motion for preliminary injunction.</p>
9-15-72	<p>Filing and entering Order constituting a three-judge court as follows: Honorable Oliver Seth; Honorable Howard C. Bratton and Honorable Edwin L. Mechem. (Lewis)</p> <p>Copy of Order mailed to counsel as notice of entry; entire pleadings mailed to Judge Seth and given to Judge Mechem.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9-25-72	Filing Plaintiffs' Request for Admissions of Defendants. Exhibits attached. Copies sent to all three Judges.
9-26-72	Case set for hearing before three judge court at Albuquerque on Thursday, Sept. 28, 1972, at 2:00 P.M. Counsel notified
9-25-72	Filing deposition of Jack Anderson. Filing deposition of Carl G. McMullan. Filing deposition of Mannie Foster.
9-26-72	Filing defendants' Motion to dismiss the First Amended Complaint. Copy given judges.
9-26-72	Filing Motion of Amerind to Intervene as Defendant. Copies given Judges. Filing Memorandum of Points and Authorities in support of applicant for intervention's motion to intervene. Copies given Judges. Filing applicant for intervention, Amerind's Motion to Dismiss. Copies given Judges. Filing Memorandum of Points and Authorities in Support of applicant for intervention's motion to dismiss plaintiffs' complaint and motion for preliminary injunction. Copies given Judges. Filing Certificate of service by applicant for intervention.
10-10-72	Filing the following subpoenas: Mr. John Carver served 9/27/72 Walter O. Olson 9/28/72
9-27-72	Filing Plaintiffs' Memorandum Brief in support of plaintiffs' motion for a preliminary injunction. Copies given to Judges.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9-28-72	<p>Filing Plaintiffs' List of Exhibits.</p> <p>Copies given to Judges.</p>
9-28-72	<p>Filing Applicant for Intervention's Preliminary Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.</p> <p>Copies given to Judges.</p>
9-28-72	<p>Albuquerque/ 3 Judge Court of Seth, Bratton and Mechem/Wilkins, Reporter. At 2:05 P.M. Call for hearing on Application for Preliminary Injunction and Motions to Dismiss. Plaintiff's appearance by Mr. Kalikowski. Defendant's appearance by Mr. Ortega. Mr. Ortega moves the admission of Harris Sherman for this case, granted. The court hears Mr. Sherman on the Motion to Intervene by Amerind. Amerind is allowed to appear as amicus curiae with right to renew Motion to Intervene later. The courts hears the application for preliminary injunction and motions to dismiss and takes the same under advisement.</p> <p>Filing Plaintiff's exhibits 1-9.</p> <p>Filing Defendant's exhibits A-F.</p>
10-13-72	<p>Case set for final hearing on the merits Wednesday, November 29, 1972, at 9:00 o'clock A.M. Counsel notified by letter.</p>
10-16-72	<p>Filing and entering Order that plaintiffs motion for an order that this action be maintained as a class action is granted, and the class is designated as all non-Indian employees of the Bureau of Indian Affairs of the Department of Interior of the United States of America, and defendants are ordered to give notice to the members of the class by posting copies of notice on sufficient bulletin boards no later than November 1, 1972. (SETH, BRATTON & MECHEM) Copies sent to three Judges.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10-16-72	<p>Copies of above order sent to counsel as notice of entry.</p> <p>Filing and entering Order that the prayer for preliminary injunction is hereby DENIED. (SETH, BRATTON & MECHEM). Copies given to judges. Copies of order sent to counsel as notice of entry.</p>
10-20-72	<p>Filing Entry of Appearance and adoption of prior pleadings on behalf of applicant for Intervention Amerind, Inc., by James Wechsler, Alan R. Taradash, Richard B. Collins, Box 116, Crownpoint, N. M. Copies given to three Judges.</p>
10-30-72	<p>Filing Plaintiff's Request for Documentation.</p> <p>Copies given to Judges.</p>
11- 1-72	<p>Filing Statement of Maria B. Andronicos, Writer-Editor, Bureau of Indian Affairs.</p> <p>Copies given to Judges.</p>
11- 3-72	<p>Filing Statement of Carl B. Shaddox in support of plaintiffs' cause. Copies given to Judges.</p> <p>Filing Statement of William J. Fossey affirming his support for the plaintiffs.</p> <p>Copies given to Judges.</p>
11- 6-72	<p>Filing Statement of Eugene B. Malveney in support of plaintiffs' cause. Copies sent to Judges.</p> <p>Filing letter-statement of Myron E. Saltmarsh in support of plaintiffs. Copies sent to Judges.</p> <p>Filing letter-statement of Ty Burnett in support of plaintiffs. Copies sent to Judges.</p>
11- 6-72	<p>Filing letter from Jesse J. Billups and letter from John E. Taylor in support of plaintiff's cause Copies given to Judges.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11- 7-72	Filing letter of Norris A. Thomson, Area Guidance Counselor, Muskogee Area Office supporting the class action suit filed by the plaintiffs. Copies sent to Judges.
11- 6-72	Filing letter of Frederick A. Goranson in support of plaintiffs suit.
11- 7-72	Filing letter from Lloyd W. England supporting plaintiffs' case. Copies of above letters sent to Judges.
11- 8-72	Filing letters from the following persons supporting the plaintiffs Complaint: Floyd Goss, Joseph D. Gray, Ivan (Dean) Krahulec, and Elmer B. Arrik. Copies sent to Judges.
11- 9-72	Filing letters from the following persons supporting the plaintiffs complaint: Goldia D. Ford and Virginia C. Rogers. Copies sent to the Judges.
11- 9-72	Filing Letter of Area Guidance Counselor, Muskogee Area Office supporting plaintiffs complaint. Copies sent to Judges.
11-13-72	Filing letter with twenty five (25) signatures of non-Indian employees supporting plaintiff's cause. From Sells Arizona.
11-10-72	Filing letter with fifteen signatures of Non-Indian employees supporting plaintiff's cause. Anadarko, Oklahoma.
11-13-72	Filing letter from Robert C. Nogler, National Representative, Eleventh District AFGE supporting plaintiff's cause. Copies of above three letters sent to Judges.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-18-72	Filing Notice to Take Deposition of Mr. John Arkansas, Mr. Bob Caswell and Miss May Hall. Copies given Judges.
11-14-72	Filing letter from Joe B. Walker, Shawnee, Oklahoma in support of Plaintiff's complaint. Copies sent to Judges.
11-15-72	Filing Renewed motion to intervene by Amerind, with Points and Authorities cited and exhibit attached. Copies sent to Judges Copy of proposed order sent to Judge Seth with copy of motion.
11-20-72	Filing and entering Order that Amerind be permitted to intervene as a party defendant in this case. Order entered upon the oral concurrence of all Members of the Court. (Bratton) Copy of Order mailed to counsel as notice of entry; copy given Judge Mechem and Judge Seth.
11-20-72	Filing letter with four (4) signatures of Non-Indian employees supporting plaintiff's cause. Brigham City, Utah. Copies to Judges. Filing letter of Virginia B. Simons of Billings, Montana supporting Plaintiff's cause. Copies sent to Judges. Filing Letter of Mrs. Dorothy K. Degnan of Billings, Montana, supporting plaintiff's cause. Copies sent to Judges. Filing letter of Lawrence E. Hanline, Scottsdale, Arizona, non-support of plaintiff's cause. Copies sent to Judges.
11-21-72	Filing Defendant's Answer to First Amended Complaint. Filing letter of Dorothy L. Vail of Billings, Montana, a non-Indian employee supporting plaintiff's cause.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-22-72	Filing U. S. Marshals Service of Subpoena Duces Tecum directed to Mr. John Arkansas; Bob Caswell and Miss May Hall served 11/18/72.
11-24-72	Filing letter of John W. Steffen supporting plaintiff's cause.
	Filing letter of Robert Berryhill supporting plaintiffs' cause. (both the above letters with attachments)
	Copies mailed to the Judges.
11-24-72	Filing letter of Ned T. Robitzer supporting plaintiff's cause.
	Filing letter of Lillie B. Ratchford supporting plaintiff's cause.
	Filing letter of Lila N. Wendel, with attachments, supporting the plaintiff's cause.
11-27-72	Filing letter of Roy M. Johnson, with attachments, supporting the plaintiff's cause.
	Filing letter of Barbara Earl; Sherma J. Nay and Billie R. Holder, supporting the plaintiff's cause.
	Filing letter with four (4) signatures supporting plaintiff's cause.
	Filing letter with eight (8) signatures supporting plaintiff's cause.
	Filing letter of Kelse T. Kennedy supporting plaintiff's cause.
	Filing letter with twenty (20) signatures supporting pltf's cause.
	Filing letter of Local 268 National Federation of Federal Employees, supporting plaintiff's cause.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-27-72	<p>Filing letter of William H. Parcell, with attachment, supporting the plaintiff's cause.</p> <p>Filing letter of David Etheridge non-Indian Employee of BIA not in support of plaintiff's cause.</p> <p>Filing letter of C. Russell Coen, Jr., supporting in part and opposing in part of this cause.</p> <p>Copies of the above letters to the Judges.</p>
11-27-72	<p>Filing letter of John J. Brown supporting plaintiff's cause.</p> <p>Copies to the Judges.</p>
11-28-72	<p>Filing Supplemental Memorandum Brief. Copies given to Judge Seth and Judge Mechem.</p> <p>Filing letter signed by five (5) persons supporting plaintiff's cause.</p> <p>Filing letter of Mary Nagashima supporting plaintiff's cause.</p> <p>Filing letter of Mary Lou Rush stating Barrow Education Association employees voted ten (10) supporting plaintiff's cause and thirteen (13) do not support plaintiff's cause.</p> <p>Copies of these letters to the Judges.</p> <p>Filing list of Plaintiffs' Exhibits. Copies to the Judges.</p>
11-29-72	Filing Answer by Intervener. Copies to the Judges.
11-30-72	<p>Filing letter from Roy E. Kohen and one anonymous letter supporting Plaintiff's complaint.</p> <p>Filing letter from Virginia D. Elliott in support of plaintiff's complaint.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-29-72	<p>Albuquerque/ Judges Seth, Bratton & Mechem/ Dearnley reporter. 9:00 A.M. called for further hearing. Plaintiffs by Mr. Kulikowski, defendant, United States, by Mr. Ortega; intervenor by Mr. Sherman. Defendant and intervenor waive opening statements. Plaintiff present evidence. 12:04 plaintiffs rest. Defendants present no evidence. Intervenor desires continuance to have a witness appear, denied. Court directs deposition of witness Peter McDonald be filed within 10 days. If rebuttal is needed, plaintiffs to obtain the Court's permission. All briefs due in 20 days. 12:12 P.M. recess.</p>
11-29-72	<p>Filing Affidavit by defendant John O. Crow.</p> <p>Filing plaintiffs and defendants' exhibits. (in deposition envelope)</p>
11-30-72	<p>Filing letter with seven signatures supporting this action.</p>
12- 1-72	<p>Filing Marshal's return of service of subpoena on Mr. John Arkansas, Chief of Disbursement Section, B.I.A. on November 28, 1972.</p> <p>Filing Marshal's return of service of subpoena on Robert M. Pattersen, Executive Office, BIA, showing same unexecuted.</p> <p>Filing Marshal's return of service of subpoena on Jack Anderson, Asst. Supt. of Industrial Area, BIC, on November 24, 1972</p>
12- 4-72	<p>Filing letter from Lila N. Wendel, Office of Education Programs, Bureau of Indian Affairs, Brigham City, Utah in support of complaint. Copies to Judges.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12- 4-72	<p>Filing letter responses from the following persons, BIA, Fairbanks, Alaska stating they do not wish to be included in the class action: Geraldine S. Evans, David L. Evans, Harold S. Kaveolook, and Jane K. George. Copies sent to Judges</p> <p>Filing letter response in support of plaintiff's complaint by Sue Prince, Venetie, Alaska. Copies sent to Judges.</p>
12- 7-72	<p>Filing letter statement in support of plaintiff's action signed by: Aldora A. Keller, LaDone Plowman, Bonnie Neil, Linda Stalnader, Glen D. Johnson, Evelyn Pohmagievich, Ferrin L. Allen, Ray Medina and Elizabeth M. Lawritzer from Fairbanks Agency, B.I.A. Copies sent to Judges.</p> <p>Filing letter from Wallace O. Craig, Fairbanks, Alaska stating he does not wish to be considered in this class action. Copies sent to Judges.</p>
12-11-72	<p>Filing letter from Henry Balliet, Education Program Administrator Bureau of Indian Affairs, New Town, North Dakota, supporting plaintiff's complaint. Copies sent to Judges.</p>
12-18-72	<p>Filing Depositions of Robert Caswell and Mae Hall and John Arkansas.</p>
12-19-72	<p>Filing Supplementary Memorandum Brief in behalf of Government Defendants. Copies given judges.</p> <p>Filing Plaintiffs' Final Trial Brief. Copies given judges.</p>
12-20-72	<p>Filing Plaintiff's Response to Intervener's Motion for Extension of Time. Copies given judges.</p>
12-21-72	<p>Filing letter, unsigned, supporting plaintiff's complaint. Copies to judges.</p>

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12-22-72	Filing unsigned letter supporting complaint. Copies sent to Judges.
12-19-72	Filing Intervenor's Motion for extension of time which to file Supplementary Memorandum. ORALLY DENIED (BRATTON) Copies sent to Judges.
12-27-72	Filing letter from Joseph Pipa, Chairman Prof. Rigsts and Responsibilities Comm., Barrow, Alaska. Filing letter from Richard B. Fairchild, President Barrow Education Association of Barrow, Alaska stating there were ten members who desired to be aligned with the plaintiff and considered members of the class action. Copies to Judges.
2-21-73	Copy of Federal Employees' News Digest from Ann Craig.
6- 1-73	Court's Memorandum Opinion. Judgment that the named defendants are permanently enjoined from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian. (SETH, BRATTON AND MECHEM) Copies of Opinion and Judgment sent to counsel. Copies sent to three Judges.

FINAL DOCKET JS 6

- 6-18-73 Filing by Shelton M. Estes a petition that the defendants be declared in contempt of court and for a cease and desist order.

RELEVANT DOCKET ENTRIES

DATE**PROCEEDINGS**

6-18-73 Copies of petition sent to three Judges.

6-29-73 Defendants' Notice of Appeal. to the U.S. Supreme Court.

Copies of Notice of Appeal sent to all counsel, copy of notice with copy of entire docket entries to Clerk, U. S. Supreme Court, copy of notice to Court Reporter, copy of entire docket entries and form letter to counsel for Defendants.

6-29-73 Notice of Appeal by Intervenor-Appellant Amerind.

Copies of Notice of Appeal sent to all counsel, copy to Clerk, U.S. Supreme Court, copy of notice to reporter, copy of entire docket entries sent to counsel for Amerind.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626

[Original Filed in My Office, Aug. 14, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT
and JULES COOPER, on behalf of themselves and all
others similarly situated, PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS

COMPLAINT

Plaintiffs complain and allege as follows:

I

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1346(a) (2) and Public Law 92-261, § 717(c) and § 706. This is a class action proceeding for a Preliminary and Permanent Injunction to enjoin the defendants from implementing and enforcing a certain Bureau of Indian Affairs new Indian preference policy, said policy being represented by Personnel Management Letter No. 72-12 issued by defendant Olson, a copy of which is attached hereto and incorporated herein as Exhibit A.

II

This is a proper case for determination by a Three-Judge Court pursuant to Title 28 USC § 2282 and § 2284 since plaintiffs seek to attach the constitutionality of

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certain Acts of Congress and the manner of administrative application of those Acts.

III

Plaintiffs bring this action as a class action on behalf of themselves and other similarly situated non-Indian employees of the Bureau of Indian Affairs pursuant to Rule 23A of the Federal Rules of Civil Procedure. Members of the class are so numerous that joinder of all members is impracticable. However, there are common questions of law and fact affecting the rights of non-Indian employees of the Bureau of Indian Affairs to continue in their employment free from discrimination based on national origin. The claims of the plaintiffs are typical of the claims of the class, and plaintiffs fairly and adequately protect the interests of the class.

IV

The new Indian preference policy being implemented by defendants proposed to extend Indian preference in employment to training and the filling of vacancies by original appointment, reinstatement and promotions.

V

Plaintiffs allege that the so-called "Indian Preference Statutes", Title 25 USC § 44, 46 and 472, are unconstitutional because they deprive plaintiffs of their rights to property without due process of law, said rights being guaranteed to plaintiffs under the Fifth Amendment to the United States Constitution.

VI

The plaintiffs further allege that the so-called "Indian Preference Statutes" are being unconstitutionally applied to them under the new policy being implemented by defendants; and that said application denies plaintiffs their rights to property without due process of law, said rights being guaranteed to plaintiffs under the Fifth Amendment to the United States Constitution.

VII

Plaintiffs further allege that the said new Indian preference policy grants powers to the defendants that are not provided for in the Indian Preference Statutes in that said statutes do not comprehend preferential treatment to Indians when agency personnel action is taken with regards to training, reinstatement and promotions.

VIII

Plaintiffs further allege that the new Indian preference policy being implemented by defendants is in direct conflict with and violates the rights of plaintiffs as federal employees, under the Civil Rights Acts of 1964 and 1972, said rights being guaranteed in Title 42 USC § 2000e-2 and Public Law 92-261, § 717.

IX

That the defendants will, unless enjoined by an appropriate order of this Court, continue to implement and enforce the new Indian preference policy. This implementation and enforcement has placed and will continue to place plaintiffs at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the plaintiffs to discrimination and deny them equal employment opportunity.

X

That the above-referenced discrimination and denials is causing and will continue to cause great and irreversible harm to the plaintiffs. It will also inhibit job performance of plaintiffs, destroy morale within the Agency, result in numerous resignations of non-Indians and ultimately lead to an overall weakening of the Agency's ability to perform its mission of serving the Indian people.

WHEREFORE, plaintiffs pray for appropriate preliminary injunction directed against defendants enjoining them from further implementing and enforcing the

said new Indian preference policy, and that the Court order a speedy hearing to determine whether said preliminary injunction will be entered;

Plaintiffs further pray the Court as follows:

1. That the preliminary injunction, if entered, be made permanent.

2. That the Court dispense with the necessity of plaintiffs' posting any security as normally called for by Rule 65(c) of the Federal Rules of Civil Procedure.

3. That the Court grant the plaintiffs' costs, reasonable attorney's fees, and such other, additional or alternative relief as appears to the Court to be equitable and just under the circumstances.

**COTTER, ATKINSON, CAMPBELL
& KELSEY**

By /s/ John M. Kulikowski
JOHN M. KULIKOWSKI
Attorneys for Plaintiffs

1300 Bank of New Mexico Building
P. O. Drawer 1126
Albuquerque, New Mexico 87103
842-6111

EXHIBIT "A"

In Reply Refer to:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

ALBUQUERQUE AREA OFFICE

P. O. Box 8327

Albuquerque, New Mexico 87108

[Jun. 28, 1972]

PERSONNEL MANAGEMENT LETTER NO. 72-12
(300, 335, 410)

Subject: Indian Preference

Incorporated in this letter is the content of a teletype received from Commissioner Bruce at 4:30 p.m., Monday, June 26, 1972. The nature of the teletype is self-explanatory. Further clarification will be made by issuance of Bureau Manual releases. This information is to be made known to all employees under your jurisdiction.

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual re-

leases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy."

/s/ Walter O. Olson
Area Director

DISTRIBUTION:

A & B

GOVERNOR, PUEBLO OF ZUNI

RAMAH NAVAJO AGENCY

COCHITI PROJECT COORDINATOR

ROSWELL TRAINING CENTER

DENVER FIELD EMPLOYMENT ASSISTANCE OFFICE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626

[Original Filed in my office, Aug. 15, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and
JULES COOPER, on behalf of themselves and all others
similarly situated, PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS

MOTION FOR PRELIMINARY INJUNCTION

Upon the Complaint and the Affidavits of C. R. MANCARI, EDWARDS and ANTHONY FRANCO, annexed hereto, the plaintiffs move the Court as follows:

1. To issue a temporary injunction directed against the defendants, their agents and those under their executive control, to suspend and restrain the implementation, operation and enforcement of the new Indian preference policy of June 23, 1972, which is evidenced by a certain personnel management letter written by defendant OLSON and attached to plaintiff's Complaint as Exhibit A. The grounds for this Motion, as more fully set forth in the Complaint and the annexed Affidavits are that:

a. The Indian Preference Statutes upon which the defendants rely in implementing the new policy are unconstitutional or in the alternative are being unconstitutionally applied to the defendants.

b. The defendants, unless enjoined, will continue to implement and enforce the new policy.

c. The policy, its implementation and enforcement have

caused, are causing and will continue to cause great and irreparable harm to the plaintiffs by discriminating against them on the basis of national origin and denying them equal employment opportunities guaranteed them under the Civil Rights Acts of 1964 and 1972. The new policy being implemented and enforced by defendants is contrary to the so-called "Indian Preference Statutes" since those statutes do not comprehend Indian preference as to training, reinstatement and promotion.

d. Unless the implementation and enforcement of the new policy is restrained pending a final disposition of the action, the injury to the plaintiffs in the interim will be irreparable even if there is a final judgment for the plaintiffs.

e. No injury will be sustained by the defendants, by the Bureau of Indian Affairs, by the public or by the Indian people through issuance of a temporary injunction.

2. To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory Court of three judges, at least one of whom shall be a Circuit Judge, in accordance with the provisions of § 2284, Title 28, United States Code.

3. That the concurrence of opposing counsel to the entrance of such a preliminary injunction has been requested, but denied.

**COTTER, ATKINSON, CAMPBELL
& KELSEY**

By /s/ John M. Kulikowski
JOHN M. KULIKOWSKI
Attorneys for Plaintiffs
1800 Bank of New Mexico Building
P. O. Drawer 1126
Albuquerque, New Mexico 87103

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626 Civil

[Original Filed in my office, Aug. 25, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and
JULES COOPER, on behalf of themselves and all others
similarly situated, PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS

FIRST AMENDED COMPLAINT

Pursuant to Rule 15(a), Federal Rules of Civil Procedure, the plaintiffs file this First Amended Complaint and allege as follows:

I

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1346(a) (2) and Public Law 92-261, § 717(c) and § 706. This is a class action proceeding for a Preliminary and Permanent Injunction to enjoin the defendants from implementing and enforcing a certain Bureau of Indian Affairs new Indian preference policy, said policy being represented by Personnel Management Letter No. 72-12 issued by defendant Olson, a copy of which is attached hereto and incorporated herein as Exhibit A.

II

This is a proper case for determination by a Three-Judge Court pursuant to Title 28 USC § 2282 and § 2284

since plaintiffs seek to attack the constitutionality of certain Acts of Congress and the manner of administrative application of those Acts.

III

Plaintiffs bring this action as a class action on behalf of themselves and other similarly situated non-Indian employees of the Bureau of Indian Affairs pursuant to Rule 23A of the Federal Rules of Civil Procedure. Members of the class are so numerous that joinder of all members is impracticable. However, there are common questions of law and fact affecting the rights of non-Indian employees of the Bureau of Indian Affairs to continue in their employment free from discrimination based on national origin. The claims of the plaintiffs are typical of the claims of the class, and plaintiffs fairly and adequately protect the interests of the class.

IV

The new Indian preference policy being implemented by defendants proposed to extend Indian preference in employment to training and the filling of vacancies by original appointment, reinstatement and promotions.

V

Plaintiffs allege that the so-called "Indian Preference Statutes", Title 25 USC § 44-46, and 472, are unconstitutional because they deprive plaintiffs of their rights to property without due process of law, said rights being guaranteed to plaintiffs under the Fifth Amendment to the United States Constitution.

VI

The plaintiffs further allege that the so-called "Indian Preference Statutes" are being unconstitutionally applied to them under the new policy being implemented by defendants; and that said application denies plaintiffs their rights to property without due process of law, said rights being guaranteed to plaintiffs under the Fifth Amendment to the United States Constitution.

VII

Plaintiffs further allege that the said new Indian Preference policy grants powers to the defendants that are not provided for in the Indian Preference Statutes in that said statutes do not comprehend preferential treatment to Indians when agency personnel action is taken with regards to training, reinstatement and promotions.

VIII

Plaintiffs further allege that the new Indian preference policy being implemented by defendants is in direct conflict with and violates the rights of plaintiffs as federal employees, under the Civil Rights Acts of 1964 and 1972, said rights being guaranteed in Title 42 USC §2000e-2 and Public Law 92-261, § 717.

IX

That the defendants will, unless enjoined by an appropriate order of this Court, continue to implement and enforce the new Indian preference policy. This implementation and enforcement has placed and will continue to place plaintiffs at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the plaintiffs to discrimination and deny them equal employment opportunity.

X

That the above-referenced discrimination and denials is causing and will continue to cause great and irreversible harm to the plaintiffs. It will also inhibit job performance of plaintiffs, destroy morale within the Agency, result in numerous resignations of non-Indians and ultimately lead to an overall weakening of the Agency's ability to perform its mission of serving the Indian people.

WHEREFORE, plaintiffs pray for an appropriate preliminary injunction directed against the defendants enjoining them from the enforcement, operation or execution of the so-called Indian Preference Statutes, being Title

25 USC § 44 to 46 and 472; and in the alternative plaintiffs pray for an appropriate preliminary injunction directed against defendants enjoining them from further implementing and enforcing the said new Indian preference policy, and that the Court order a speedy hearing to determine whether one of the preliminary injunctions prayed for will be entered;

Plaintiffs further pray the Court as follows:

1. That the preliminary injunction, if entered, be made permanent.

2. That the Court dispense with the necessity of plaintiffs' posting any security as normally called for by Rule 65(c) of the Federal Rules of Civil Procedure.

3. That the Court grant the plaintiffs' costs, reasonable attorney's fees, and such other, additional or alternative relief as appears to the Court to be equitable and just under the circumstances.

**COTTER, ATKINSON, CAMPBELL
& KELSEY**

By /s/ John M. Kulikowski
JOHN M. KULIKOWSKI
Attorneys for Plaintiffs

1300 Bank of New Mexico Building
P. O. Drawer 1126
Albuquerque, New Mexico 87103
842-6111

EXHIBIT "A"

In Reply Refer To

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

ALBUQUERQUE AREA OFFICE

P. O. Box 8327

Albuquerque, New Mexico 87108

[Jun. 28, 1972]

PERSONNEL MANAGEMENT LETTER NO. 72-12
(300, 835, 410)

Subject: Indian Preference

Incorporated in this letter is the content of a teletype received from Commissioner Bruce at 4:30 p.m., Monday, June 26, 1972. The nature of the teletype is self-explanatory. Further clarification will be made by issuance of Bureau Manual releases. This information is to be made known to all employees under your jurisdiction.

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE, has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised

Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy."

/s/ Walter O. Olson
Area Director

DISTRIBUTION:

A & B

GOVERNOR, PUEBLO OF ZUNI

RAMAH NAVAJO AGENCY

COCHITI PROJECT COORDINATOR

ROSWELL TRAINING CENTER

DENVER FIELD EMPLOYMENT ASSISTANCE OFFICE

EXHIBIT "A"

[SEAL]

In Reply Refer To:
Personnel

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Field Support Services Office
500 Gold Avenue, S.W.
P.O. Box 2026
Albuquerque, New Mexico 87198

[Received Sept. 8, 1972, U.S. Attorneys Office,
Albuquerque, N. M.]

[Sep. 08, 1972]

Memorandum

To: Mr. Victor Ortega
U.S. District Attorney

From: Personnel Officer
Field Support Services Office

Subject: Additional Information Requested Concerning
Deposition
C. R. Mancari, et. al. vs Rogers C. B. Morton,
as Secretary of Interior et. al.

The vacancy that was created by Mr. Robert McKinley's resignation has been filled by an Indian candidate. Mr. Begay was selected as a result of utilizing the Applicant Supply File. As was told during the proceedings of the deposition on September 6, 1972, the position was not advertised. Mr. Begay was qualified and was an Indian candidate he, therefore, was given an Excepted Appointment as Program Analyst, GS-9. Management always has the prerogative of employing outside candidates rather than promoting [illegible] current workforce.

Since the announcement of the expanded Preference Policy was disseminated 22 Promotional Opportunity Bulletins have been issued. As a result, 17 certificates have been forwarded to operating officials or selecting offices for action. Selections have been made and 15 Indians were selected and two non-Indians have been selected.

No selections have been made on the remaining five certificates.

/s/ Carl G. McMullen
CARL G. McMULLEN
Personnel Officer, FSSO

EXHIBIT "B"**ALBUQUERQUE AREA OFFICE****PROMOTIONS FROM JUNE 26, 1972 TO SEPTEMBER 26, 1972**

<u>Indian</u>		<u>Non-Indian</u>	
Wage Grade	2	Wage Grade	0
General Schedule	2	General Schedule	2
	3		3
	4		4
	5		5
	6		6
	7		7
	8		8
	9		9
	10		10
	11		11
	12		12
	13		13
	14		14
	15		15
Total	18	Total	09

EXHIBIT C**ALBUQUERQUE AREA OFFICE****PROMOTIONS FROM JANUARY 1, 1972 TO JUNE 26, 1972**

<u>Indian</u>		<u>Non-Indian</u>	
Wage Grade.....	2	Wage Grade.....	0
General Schedule 2.....	0	General Schedule 2.....	0
3.....	3	3.....	0
4.....	3	4.....	1
5.....	0	5.....	1
6.....	0	6.....	0
7.....	2	7.....	4
8.....	0	8.....	0
9.....	1	9.....	4
10.....	0	10.....	0
11.....	0	11.....	7
12.....	0	12.....	0
13.....	0	13.....	0
14.....	0	14.....	0
15.....	0	15.....	0
Total	20	Total	17

EXHIBIT D

[SEAL]

In Reply Refer To:
Personnel Management
BCCO-3875

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[Sep. 1, 1972]

Honorable Bob Packwood
United States Senate
Washington, D.C. 20510

Dear Senator Packwood:

We have received your inquiry on behalf of three of your constituents regarding the expanded policy granting preference to Indians in promotion in this Bureau.

We can understand the concern about the effect of this new policy on Bureau employees. Realizing that the policy would present some problems of implementation and adaptation, we deliberated for some time on the many factors involved. Since this Administration has placed emphasis on increased Indian self-determination and direction of Federal Indian programs, we began an intensive study last year on the Indian preference laws (including their legislative history and intent). From this study evolved a policy statement proposing an expansion of Indian preference. This was submitted to the Department of the Interior for review and comment by the Solicitor and other Departmental officials. On June 23, Secretary Morton announced his approval of the Bureau's [illegible] to include preference in the filling of vacancies by promotion. The U.S. Civil Service Commission, which has responsibility for such Federal programs as merit promotion and equal employment opportunity, has stated that our revised preference policy is "consistent with programs administered

by the Commission." They have advised us that no conflict exists in regard to provisions of the Equal Employment Opportunity Act of 1972, (PL 92-261) and Executive Order 11478.

The expanded Indian preference policy represents our acceding to the full Congressional mandate involved in the various statutes pertaining to preference, intending that preference be applicable to filling all vacancies in the Bureau, whether by initial appointment, reinstatement or promotion. The inclusion of promotions is an expansion of the policy which has been in effect since the passage of the 1934 Indian Reorganization Act, the latest law which expressly called for preference in Bureau employment. We have the responsibility, of course, of giving full effect to the Indian preference laws which Congress has enacted and that is the purpose of the policy revision approved by the Secretary. Any questions concerning the validity of those laws appear to be matters for judicial rather than administrative determination.

The revised policy is intended to provide increased developmental opportunities for Indians in the Bureau. It emphasizes our goal of achieving greater involvement of Indians in the administration of Indian programs, a goal which is consistent with President Nixon's announced policy of increased self-determination in Federal and local matters affecting Indian people. It is unfortunate that some non-Indian employees now feel that their employment is in jeopardy. We want to assure them that the new policy does not affect their current jobs or employment status. There will be times when there are no qualified Indian candidates for positions and non-Indians will be selected for promotion; also, exceptions to the policy may be approved by this office when non-Indians have superior qualifications for particular positions.

We intend to maintain high quality leadership throughout the Bureau for the benefit of the Indians and to provide opportunity for Indians to assist their own people. The success of Bureau programs in serving the Indian populace depends to a large degree on the cooperation and

support of all employees. We hope that each employee's efforts will reflect that support of the Bureau's mission.

We are preparing the guidelines for a Federal Service Placement Program to assist employees interested in finding employment in other Bureaus' of the Department of the Interior, and other Federal agencies. When this program has been approved, you may be assured that each Bureau employee will be advised of the opportunity to participate in this program.

Sincerely yours,

/s/ John D. Crow
Deputy Commissioner

Enclosure
Constituent's Letter

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

[Filed at Albuquerque, Sep. 26, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT
and JULES COOPER, on behalf of themselves and all
others similarly situated, PLAINTIFFS

vs.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS

MOTION TO DISMISS

COME NOW the defendants by the United States At-
torney, District of New Mexico, and move the Court for
an order dismissing the First Amended Complaint and
this action, and as grounds for such motion state that the
First Amended Complaint fails to state a claim upon
which relief can be granted. In support of this motion
the defendants would respectfully refer the Court to the
Preliminary Memorandum in Opposition to Motion for
Preliminary Injunction which has been filed herein by
the United States Attorney.

/s/ Victor R. Ortega
VICTOR R. ORTEGA
United States Attorney
District of New Mexico
P. O. Box 607
Albuquerque, New Mexico 87103

I HEREBY CERTIFY that I mailed a true copy of the foregoing pleading to opposing counsel of record this 25 day of September, 1972.

/s/ Victor R. Ortega

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626

[Filed at Albuquerque, Sep. 26, 1972,
E. E. Greeson, Clerk]

MANCARI, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior,
ET AL., DEFENDANTS

AMERIND, Applicant For Intervention

MOTION TO INTERVENE AS DEFENDANT

COMES NOW Amerind, a non-profit national Indian organization, and moves this Honorable Court, pursuant to Rule 24, Federal Rules of Civil Procedure, for an Order granting leave to intervene in the case herein as a party defendant, and as grounds therefor, alleges:

1. That the above-captioned case, pending before this Honorable Court, involves questions of the constitutionality of the Indian Preference Statutes (25 U.S.C. 44, 45, 46, 472) and implementation thereof within the Bureau of Indian Affairs and Department of Interior.

2. That plaintiffs herein allege that the above-mentioned Indian Preference Statutes are unconstitutional on their face, or in the alternative, are unconstitutional as applied in the employment areas of training and promotion.

3. That Plaintiffs' allegations relating to the Indian Preference Statutes directly and substantially affect the rights of all present and prospective Indian employees of the Bureau of Indian Affairs. There are approximately 9,000 Indians employed by the BIA who will be substantially affected by the determination of issues raised in this case. (See Exhibit A.)

4. That the Applicant herein, Amerind, is a national non-profit Indian organization chartered under the laws of the State of New Mexico with membership comprised primarily of BIA Indian employees and organized with the express purpose of representing the rights of Indian employees of the Bureau of Indian Affairs.

5. That the Applicant, Amerind, avers that Plaintiffs' claims herein directly and substantially threaten the rights and interests of Amerind members as well as the rights of all Indian employees of the Bureau of Indian Affairs.

6. That Amerind avers that the Indian Preference Statutes are constitutional on their face and as applied, and that Amerind will raise in defense of said Indian Preference Statutes common questions of law and fact with the main action herein.

7. That Amerind, by virtue of its representation of the rights of Indian employees, is a real and necessary party of interest in this controversy.

8. That the Defendants herein are officials of the Bureau of Indian Affairs and Department of Interior and do not primarily nor directly represent the rights and interests of Indian employees of the BIA, particularly in reference to the Indian Preference Statutes and implementation thereof. That involved in this litigation are issues of interpretation of the Indian Preference Statutes and questions of implementation about which there have been grave differences and genuine controversy, particularly in the areas of promotion and training, between the Defendants and Indians employed in the BIA. The policies previously pursued by Defendants are not in accord with those urged by Indian employees, as exemplified in the case of *Freeman, et al. v. Morton et al.*, Civil Action No. 827-71, pending before the United States District Court for the District of Columbia, wherein several plaintiffs are members of Amerind.

9. That representation of Applicant's interest by the existing parties is or may be inadequate and might

result in Applicant's inability to protect the rights and interests of its members by any disposition of this action in its absence.

10. That intervention by Amerind as a party defendant will not significantly delay the action herein or jeopardize the rights of the parties herein.

11. That by reason of the above and foregoing, this Honorable Court cannot determine the controversy without prejudice to the rights of the Applicant and its members; that full and complete justice cannot be done without the presence of Applicant as a party herein; and that Applicant and the parties it represents are a necessary party in order to make a complete determination of the controversies herein.

WHEREFORE, Amerind requests an Order granting leave to the Applicant to intervene in this case as a party defendant.

Respectfully submitted,

SHERMAN & SHERMAN, P. C.

By /s/ Harris D. Sherman
HARRIS D. SHERMAN
1180 Capitol Life Center
Denver, Colorado 80203
(303) 892-6022

ARNOLD & PORTER

By /s/ Patrick J. MacRory
PATRICK J. MACROKY
1229 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 228-3200

EXHIBIT A

The following tables represent the number of Indians and non-Indians, classified by GS Grade and Wage Board level, employed by the BIA in November 1969:

<u>GS Grade</u>	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
1	6	0	6
2	175	7	182
3	1,302	125	1,427
4	1,324	400	2,224
5	922	597	1,519
6	118	106	224
7	881	676	1,056
8	12	14	26
9	527	2,194	2,722
10	8	65	73
11	266	921	1,187
12	184	694	827
13	67	327	394
14	47	239	286
15	11	53	64
16	2	4	6
17	0	2	2
	<u>5,802</u>	<u>6,423</u>	<u>12,225</u>

<u>Wage Board</u>	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
Less than \$5,000	68	8	76
\$ 5,000- 5,499	222	12	234
\$ 5,500- 5,999	359	22	381
\$ 6,000- 6,499	265	49	314
\$ 6,500- 6,999	424	60	484
\$ 7,000- 7,999	539	151	690
\$ 8,000- 8,999	381	201	582
\$ 9,000- 9,999	96	100	196
\$10,000-11,999	114	93	207
\$12,000-13,999	36	28	64
\$14,000-15,999	35	8	43
\$16,000-17,999	6	16	22
\$18,000-19,999	0	5	5
	<u>2,545</u>	<u>753</u>	<u>3,298</u>

Totals:

	<u>BIA Data</u>		
	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
GS Employees	5,802	6,423	12,225
Wage Board	2,545	753	3,298
	<u>8,347</u>	<u>7,176</u>	<u>15,523</u>

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626

[Filed at Albuquerque, Sep. 26, 1972,
E. E. Greeson, Clerk]

MANGANI, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, as Secretary of the Interior,
ET AL., DEFENDANTS

AMERIND, Applicant For Intervention

MOTION TO DISMISS

COMES NOW the Applicant for Intervention, Amerind, by and through its attorneys, and hereby moves this Honorable Court to dismiss plaintiffs' Complaint for Injunctive Relief and Plaintiffs' Motion for Preliminary Injunction. In support of its Motion, Applicant submits herewith a Memorandum of Points and Authorities.

SHERMAN & SHERMAN, P. C.

By /s/ Harris D. Sherman
HARRIS D. SHERMAN
1130 Capitol Life Center
Denver, Colorado 80203
(303) 892-6022

ARNOLD & PORTER

By /s/ Patrick J. MacRory
PATRICK J. MACRORY
1229 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 223-3200

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

[Original Filed in My Office, Nov. 21, 1972,
E. E. Greeson, Clerk]

C. R. MANCARI, ET AL., PLAINTIFFS

vs.

ROGERS C. B. MORTON, as Secretary of the Interior,
ET AL., DEFENDANTS

ANSWER

The defendants for their answer to the First Amended Complaint state as follows:

FIRST DEFENSE

1. The allegations of paragraph IV are admitted insofar as they allege that the Commissioner of Indian Affairs, on or about June 26, 1972, transmitted a telegram to all area offices of the Bureau of Indian Affairs announcing that a policy of providing preference in promotions and training was to take effect immediately. However, while action may have been taken by Bureau of Indian Affairs officials pursuant to such telegram, the final policy of the Bureau is still in the process of being formulated. By further answer to such allegation, the defendants state that since the hearing on the motion for a preliminary injunction, the Bureau of Indian Affairs has decided not to grant preference to Indians in the matter of training, rendering such issue moot insofar as this litigation is concerned.

2. The material allegations of paragraphs V, VI, VIII and X are denied.

3. With respect to the allegations of paragraph VII, the defendants state that the Bureau of Indian Affairs has decided not to grant preference to Indians in training, rendering such issue moot insofar as this litigation is concerned. Further, the defendants state that they are informed and believe that no non-Indians have been denied a training opportunity since June 23, 1972 because of the new proposed preference policy and that training activity for Indians and non-Indians has proceeded in accordance with determined individual need. The remaining material allegations of paragraph VII are denied.

4. With respect to the allegations of paragraph IX, the defendants admit that when the new Indian preference policy is finally formulated, they will implement and enforce a policy of granting preference to Indians in the matter of promotions and reinstatement. The remaining material allegations of paragraph IX are denied.

5. Insofar as the allegations of paragraph I attempt to allege jurisdiction of this Court to entertain this action, the same are denied. The plaintiffs have failed to allege the jurisdictional amount required by 28 U.S.C. 1346(a) (2) and any amounts attributable to the members of the class cannot be aggregated in order to establish the jurisdictional amount required. The defendants admit the execution and genuineness of Personnel Management letter No. 72-12 issued by defendant Olson attached to the First Amended Complaint as Exhibit "A."

6. With respect to the allegations of paragraph II of the First Complaint, the defendants admit that this is a proper case for determination by a three-judge Court pursuant to 28 U.S.C. § 2282 and § 2284 in the event that this Court has jurisdiction under 28 U.S.C. § 1346(a) (2).

7. With respect to the allegations of paragraph III of the First Amended Complaint, defendants deny that the plaintiffs adequately represent all members of the class they purport to represent. Defendants are informed and believe that only the plaintiff Mancari has applied for a vacant position since June 23, 1972 and no final action

in the normal course of business has yet been taken with respect to her application.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

Insofar as jurisdiction is predicated on the Equal Employment Opportunity Act of 1972, Public Law 92-261, 86 Stat. 103 (March 24, 1972), plaintiffs have failed to exhaust the administrative remedies provided by such statute.

FOURTH DEFENSE

Since the inception of this action, the Bureau of Indian Affairs has decided not to grant preference to Indians in matters of training, rendering such issues moot in view of the fact that few, if any, non-Indians have been denied a training opportunity because of the proposed policy announced on June 23, 1972.

FIFTH DEFENSE

The plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted.

SIXTH DEFENSE

The proposed Indian preference policy alleged is constitutional and authorized by statute; however, it is not yet final and this Court should defer any decision other than a dismissal of this action until it is clear how this policy will ultimately be implemented in fact.

WHEREFORE, defendants pray that this action be dismissed with prejudice and that the cost of this action be assessed against the plaintiffs.

VICTOR R. ORTEGA
United States Attorney
District of New Mexico
P. O. Box 607
Albuquerque, New Mexico 87103

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 9626

C. R. MANCARI, ET AL., PLAINTIFFS

vs.

ROGERS C. B. MORTON, as Secretary of the Interior,
ET AL., DEFENDANTS
AMERIND, Intervener

ANSWER BY INTERVENER

COMES NOW the Intervener, Amerind by and through its attorneys and in answer to the complaint of Plaintiffs states as follows:

FIRST DEFENSE

The Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. The Court lacks jurisdiction over the subject matter in this action.

2. Plaintiffs, in relying upon the Equal Employment Opportunity Act of 1972, 86 Stat. 103' (March 24, 1972) have failed to exhaust their administrative remedies as provided by said statute and therefore, cannot invoke the jurisdiction of this Court.

THIRD DEFENSE

Each and every allegation set forth in Plaintiffs' complaint relating to preferences to Indians in the area of training has been rendered moot in view of the Bureau of Indian Affairs October 30, 1972 Regulations excepting training from the scope of the Bureau's new preference policies; and furthermore, upon information and belief

few, if any, non-Indians have been denied any training opportunities because of Indian Preference.

FOURTH DEFENSE

Intervener denies the material allegations of paragraphs 5, 6, 7, 8 & 10 and further denies the allegations of Paragraph 4 insofar as Defendants' have refused to extend Indian Preference in the area of training.

FIFTH DEFENSE

The Intervener denies the allegations set forth in the third paragraph of Plaintiffs' complaint and states that this action is not a class action and that Plaintiffs have no standing to represent this class fairly and adequately.

SIXTH DEFENSE

The Intervener maintains that the October 30, 1972 Policy of Defendants is constitutional and thereby authorizes a preference for Indian employees in the areas of promotion, re-instatement and initial employment.

WHEREFORE, Intervener prays that this action be dismissed with prejudice and that the costs of this action be assessed against Plaintiffs.

Respectfully submitted,

SHERMAN, QUINN and
SHERMAN

By /s/ Harris D. Sherman
HARRIS D. SHERMAN
1130 Capitol Life Center
Denver, Colorado 80203
892-6022

James Wechaler
Box 116
Crownpoint, New Mexico 87318

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT
and JULES COOPER, on behalf of themselves and all
others similarly situated, PLAINTIFFS-APPELLEES

v.

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS-APPELLANTS

v.

AMERIND, INTERVENOR-APPELLANT

NOTICE OF APPEAL

Pursuant to Rules 10 and 11, Supreme Court of the
United States, the above-named Appellant, Amerind, here-
by appeals to the United States Supreme Court from the
final order of the United States District Court for the
District of New Mexico, granting Appellees' Complaint
for injunctive relief, entered in this action on June 1,
1973.

This notice of appeal, filed this 29th day of June, 1973,
is taken pursuant to 28 U.S.C § 1253.

Respectfully submitted,

By /s/ Harris D. Sherman
HARRIS D. SHERMAN
Attorney for Intervenor-
Appellant Amerind
1130 Capitol Life Center
Denver, Colorado 80203
(303) 892-6022

PROOF OF SERVICE

I, Harris D. Sherman, an attorney in the office of Sherman and Sherman, P.C., attorneys of record for Amerind, Appellant herein, depose and say that on the 28th day of June, 1978, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on C. R. Mancari, Anthony Franco, Wilbert Garrett, and Jules Cooper, Appellees herein, by mailing a copy thereof with airmail postage prepaid to John M. Kulikowski, counsel of record for Appellees, at the offices of Cotter, Atkinson, Campbell, Kelsey and Hanna, located at 1300 Bank of New Mexico Building, P. O. Drawer 1126, Albuquerque, New Mexico, 87103; on Rogers C. B. Morton, Louis R. Bruce, Walter O. Olson, and Anthony Lincoln, Appellants herein, by mailing a copy thereof with airmail postage prepaid to Victor Ortega, U.S. Attorney, Counsel for Appellants, U.S. Courthouse, Fifth and Gold, S.W., Albuquerque, New Mexico; and on The Solicitor General, Department of Justice, Washington, D.C. 20503.

/s/ Harris D. Sherman
Signed

Subscribed and sworn to before me, at the Capitol Life Center, Denver, Colorado, 80203, this 28 day of June, 1978.

My commission expires: October 31, 1978

/s/ Mary J. Jones
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 73-362

**ROGERS C. B. MORTON, SECRETARY
OF THE INTERIOR, ET AL., APPELLANTS**

v.

C. R. MANCARI ET AL.

**Appeal from the United States District Court
for the District of New Mexico**

**The statement of jurisdiction in this cause having been
submitted and considered by the Court, probable juris-
diction is noted.**

January 14, 1974

PLAINTIFF'S EXHIBIT 1

In Reply Refer To:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

ALBUQUERQUE AREA OFFICE

P. O. Box 8327

Albuquerque, New Mexico 87108

[Jun. 28, 1972]

PERSONNEL MANAGEMENT LETTER NO. 72-12
(800, 335, 410)

Subject: Indian Preference

Incorporated in this letter is the content of a teletype received from Commissioner Bruce at 4:30 p.m., Monday, June 26, 1972. The nature of the teletype is self-explanatory. Further clarification will be made by issuance of Bureau Manual releases. This information is to be made known to all employees under your jurisdiction.

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights on non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and

is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy."

Walter O. Olson
Area Director

DISTRIBUTION:

A & B

GOVERNOR, PUEBLO OF ZUNI

RAMAH NAVAJO AGENCY

COCHITI PROJECT COORINATOR

ROSWELL TRAINING CENTER

DENVER FIELD EMPLOYMENT ASSISTANCE OFFICE

PLAINTIFF'S EXHIBIT 2

In Reply Refer To:

[SEAL]

Your Reference

UNITED STATES CIVIL SERVICE
COMMISSION

WASHINGTON, D.C. 20415

[Jul. 5, 1972]

Honorable Rogers C. B. Morton
Secretary of the Interior
Washington, D.C. 20240

Dear Mr. Secretary:

My colleagues and I were pleased to learn that you recently approved a policy providing that Indians are to receive preference to all vacancies in the Bureau of Indian Affairs whether filled by original appointment, reinstatement, or promotion.

The Commission agree with your interpretation of the Indian preference laws and thus finds your policy reflecting this interpretation to be consistent with programs administered by the Commission. We are gratified that your Department and the Department of Health, Education, and Welfare are now in accord on this issue. We feel it is essential that the Federal government maintain a uniform approach to the application of Indian preference.

One aspect of the new policy causes us some concern and we suggest that it be given special consideration. To non-Indian employees, this is a matter of long-standing statutes suddenly being interpreted differently. After years of working under one set of rules these employees may feel that now their careers are in jeopardy, and with no change in the law to point to as the reason for the new conditions. As career Federal employees they have a right to expect that they will still be given every op-

portunity to fulfill their hopes and aspirations as was implied under the conditions which existed at the time they were employed. We urge this will be kept in mind as the new policy is carried out.

If our staff can be of any assistance to you or the Bureau of Indian Affairs in implementing the new policy please call on us.

By direction of the Commission:

Sincerely yours,

/s/ Robert E. Hampton
ROBERT E. HAMPTON
Chairman

PLAINTIFF'S EXHIBIT 3

[SEAL]

In Reply Refer To:
Personnel

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
FIELD SUPPORT SERVICES OFFICE
500 Gold Avenue, S.W.
P. O. Box 2026
Albuquerque, New Mexico 87108

[Sep. 08, 1972]

Memorandum

To: Mr. Victor Ortega
U.S. District Attorney

From: Personnel Officer
Field Support Services Office

Subject: Additional Information Requested Concerning
Deposition
C. R. Mancari, et. al. vs Rogers C. B. Morton,
as Secretary of Interior et. al.

The vacancy that was created by Mr. Robert McKinley's resignation has been filled by an Indian candidate. Mr. Begay was selected as a result of utilizing the Applicant Supply File. As was told during the proceedings of the deposition of September 6, 1972, the position was not advertised. Mr. Begay was qualified and was an Indian candidate he, therefore, was given an Excepted Appointment as Program Analyst, GS-9. Management always has the prerogative of employing outside candidates rather than promoting [illegible] current workforce.

Since the announcement of the expanded Preference Policy was disseminated 22 Promotional Opportunity Bulletins have been issued. As a result, 17 certificates have

been forwarded to operating officials or selecting offices for action. Selections have been made and 15 Indians were selected and two non-Indians have been selected.

No selections have been made on the remaining five certificates.

/s/ Carl G. McMullen
CARL G. MCMULLEN
Personnel Officer, FSSO

PLAINTIFF'S EXHIBIT 4

ALBUQUERQUE AREA OFFICE

PROMOTIONS FROM JUNE 24, 1972 TO SEPTEMBER 24, 1972

<u>Indian</u>		<u>Non-Indian</u>	
Wage Grade	2	Wage Grade	0
General Schedule	2	General Schedule	2
	3		3
	4		4
	5		5
	6		6
	7		7
	8		8
	9		9
	10		10
	11		11
	12		12
	13		13
	14		14
	15		15
<u>Total</u>	18	<u>Total</u>	00

PLAINTIFF'S EXHIBIT 5

ALBUQUERQUE AREA OFFICE

PROMOTIONS FROM JANUARY 1, 1972 TO JUNE 26, 1972

<u>Indian</u>		<u>Non-Indian</u>	
Wage Grade	2	Wage Grade	0
General Schedule	2	General Schedule	2
	3		3
	4		3
	5		0
	6		0
	7		2
	8		0
	9		1
	10		0
	11		0
	12		0
	13		0
	14		0
	15		0
Total	20	Total	17

PLAINTIFF'S EXHIBIT 6**[SEAL]**

**In Reply Refer To:
Personnel Management
BCCO-3875**

**UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242**

[Sep. 1, 1972]

**Honorable Bob Packwood
United States Senate
Washington, D.C. 20510**

Dear Senator Packwood:

We have received your inquiry on behalf of three of your constituents regarding the expanded policy granting preference to Indians in promotion in this Bureau.

We can understand the concern about the effect of this new policy on Bureau employees. Realizing that the policy would present some problems of implementation and adaptation, we deliberated for some time on the many factors involved. Since this Administration has placed emphasis on increased Indian self-determination and direction of Federal Indian programs, we believe an intensive study last year on the Indian preference laws (including their legislative history and intent). From this study evolved a policy statement proposing an expansion of Indian preference. This was submitted to the Department of the Interior for review and comment by the Solicitor and other Departmental officials. On June 23, Secretary Morton announced his approval of the Bureau's policy [illegible] to include preference in the filling of vacancies by promotion. The U.S. Civil Service Commission, which has responsibility for such Federal programs as merit promotion and equal employment opportunity, has stated that our revised preference policy is "consistent with programs administered by the Commission." They have advised us that no conflict exists in regard to pro-

visions of the Equal Employment Opportunity Act of 1972, (PL 92-261) and Executive Order 11478.

The expanded Indian preference policy represents our acceding to the full Congressional mandate involved in the various statutes pertaining to preference, intending that preference be applicable to filling all vacancies in the Bureau, whether by initial appointment, reinstatement, or promotion. The inclusion of promotions is an expansion of the policy which has been in effect since the passage of the 1934 Indian Reorganization Act, the latest law which expressly called for preference in Bureau employment. We have the responsibility, of course, of giving full effect to the Indian preference laws which Congress has enacted and that is the purpose of the policy revision approved by the Secretary. Any questions concerning the validity of those laws appear to be matters for judicial rather than administrative determination.

The revised policy is intended to provide increased developmental opportunities for Indians in the Bureau. It emphasizes our goal of achieving greater involvement of Indians in the administration of Indian programs, a goal which is consistent with President Nixon's announced policy of increased self-determination in Federal and local matters affecting Indian people. It is unfortunate that some non-Indian employees now feel that their employment is in jeopardy. We want to assure them that the new policy does not affect their current jobs or employment status. There will be times when there are no qualified Indian candidates for positions and non-Indians will be selected for promotion; also, exceptions to the policy may be approved by this office when non-Indians have superior qualifications for particular positions.

We intend to maintain high quality leadership throughout the Bureau for the benefit of the Indians and to provide opportunity for Indians to assist their own people. The success of Bureau programs in serving the Indian populace depends to a large degree on the cooperation and support of all employees. We hope that each employee's efforts will reflect that support of the Bureau's mission.

We are preparing the guidelines for a Federal Service Placement Program to assist employees interested in finding employment in other Bureaus' of the Department of the Interior, and other Federal agencies. When this program has been approved, you may be assured that each Bureau employee will be advised of the opportunity to participate in this Program.

Sincerely yours,

/s/ John D. Crow
Deputy Commissioner

Enclosure
Constituent's Letter

PLAINTIFF'S EXHIBIT 7

In Reply Refer To:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P. O. Box 8327
Albuquerque, New Mexico 87108

Announcement No.: AAO 27/72

Position: Training Instructor (Basic Numerical Processing) CS-1712-9

Date: August 29, 1972

Location: Southwestern Indian Polytechnic Institute Albuquerque

Mrs. Evelyn Sellers Brannan
P.O. Box 362
Belen, New Mexico

Dear Mrs. Brannan

Your qualifications for the position shown above have been considered with those of other eligible candidates. Clarence Coriz was selected for the position.

Your application has been returned to the office of the Civil Service Commission with which you filed it. Your name will be put back on the list of eligibles in that office and you will be considered for certification for other positions for which you are eligible.

Sincerely yours,

Chief, Personnel Services Section

PLAINTIFF'S EXHIBIT 8

In Reply Refer To:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P. O. Box 8327
Albuquerque, New Mexico 87108

[Sep. 26, 1972]

Mrs. Evelyn S. Brannan
P. O. Box 362
Belen, New Mexico 87002

Dear Mrs. Brannan:

This is in reply to your letter of September 14 to Mae Hall regarding the Selection of Clarence Coriz to the position of Training Instructor (Basic Numerical Processing).

Your application was certified to us by the Civil Service Commission along with other qualified applicants for the purpose of supplementing our own certificate of employees eligible for promotion.

Mr. Coriz, a candidate eligible to Indian Preference in initial employment was selected.

Thank you for your interest in employment with us.

Sincerely yours,

Chief, Personnel Services Section

PLAINTIFF'S EXHIBIT 9

Personnel-601

[Jul. 13, 1972]

Through: Superintendent, Southwestern Indian Polytechnic Institute

Mr. Clyde McFalls
Audio-Visual Production Specialist
Southwestern Indian Polytechnic Institute
Albuquerque, New Mexico 87114

Dear Mr. McFalls:

This is in response to your telephone request for a written statement as to why you were not on the certificate for Visual Information Specialist, GS-1084-9, Branch of Instruction, Southwestern Indian Polytechnic Institute.

We are enclosing a copy for your ready reference of the teletype from the Commissioner dated June 26, 1972, distributed to all employees. Please note that the new Indian Preference policy states that where two or more candidates meet the established qualification requirements for the vacancy, if one is an Indian, he shall be given preference in filling the vacancy.

Therefore, to comply with the Commissioner's new Indian Preference policy, the Indian applicant was the only applicant certified for consideration.

Sincerely yours,

/s/ H. Mannie Foster
Acting Area Personnel Officer

Enclosure
601/M Hall/fma/07-13-72
File
Chrono

PLAINTIFF'S EXHIBIT 10

[SEAL]

In Reply Refer To:
Personnel Mgmt.

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[Nov. 20, 1972]

Memorandum

To: Associate Solicitor-Indian Affairs
From: Commissioner of Indian Affairs
Subject: Data Requested for Mancari v. Morton

We are furnishing the following information on promotions in the Bureau of Indian Affairs in response to the request made by Plaintiffs' counsel. These figures represent the Bureauwide total of "promotion plan actions," i.e., promotion from one position to a different position; as requested, they do not include "career promotions" or "reclassification" actions.

<u>Jan. 1-June 23, 1972</u>		<u>June 24-Nov. 15, 1972</u>	
Indian	— 96	Indian	— 259
Non-Indian	— 75	Non-Indian	— 85

The smaller number of actions during the earlier period reflects the existence of Departmental and Bureau restrictions on hiring and promotions as a result of Federal efforts to reduce employment and average grade.

/s/ John D. Crow
Commissioner

PLAINTIFF'S EXHIBIT 11

DEPARTMENT OF INTERIOR
BUREAU OF INDIAN AFFAIRS
FIELD ADMINISTRATIVE OFFICE
Albuquerque, New Mexico 87103

VACANCY ANNOUNCEMENT

Position: Computer Systems Analyst GS-334-9 (Five Positions)	FAO-6-72 Bulletin No.
Location: Indian Affairs Data Center Data Processing Branch Albuquerque, New Mexico	04-03-72 Issuing Date
Area of Consideration: Bureau Wide	04-17-72 Closing Date

- Final action on Filing these positions will be subject to Central Office approval and employment ceiling limitations.

LIVING AND WORKING CONDITIONS-DUTIES-ED-
UCATION AND EXPERIENCE REQUIREMENTS

LIVING AND WORKING CONDITIONS: This position is physically located in Albuquerque, New Mexico. No Government housing is available, however, housing accommodations for purchase or rent are in adequate supply in Albuquerque, a rapidly growing city with a metropolitan population in excess of 250,000. It is centrally located on U.S. Highways 66 and 85, has excellent public and parochial schools, grades 1 through 12, plus the University of New Mexico and the University of Albuquerque and has churches of 28 denominations. Varied sport facilities are available including skiing, hunting, fishing and golf. The altitude is approximately 5,200 feet; average year-round temperature is 70.6 degrees, with lots of sunshine and humidity is low. There is occasionally light snow in the winter.

ALL QUALIFIED APPLICANTS WILL RECEIVE CONSIDERATION WITHOUT REGARD TO RACE, COLOR, SEX, POLITICS, RELIGION OR NATIONAL ORIGIN. APPLICATIONS FROM QUALIFIED PERSONS NOT CURRENTLY EMPLOYED BY THE FEDERAL GOVERNMENT WILL BE CONSIDERED AS "OUTSIDE" APPLICANTS. IN THE EVENT SELECTION IS MADE FROM AMONG "OUTSIDE" APPLICANTS, INDIVIDUALS OF $\frac{1}{4}$ OR MORE INDIAN ANCESTRY WILL BE GIVEN PREFERENCE BY LAW, IN INITIAL EMPLOYMENT OR REEMPLOYMENT. SUCH INDIAN PREFERENCE APPLICANTS SHOULD INDICATE THEIR DEGREE OF INDIAN BLOOD AND PLACE OF ENROLLMENT ON THE APPLICATION FOR FEDERAL EMPLOYMENT. CONFIRMATION OF ELIGIBILITY FOR INDIAN PREFERENCE WILL BE REQUESTED FROM THE APPLICANT, IF SELECTED, AND WILL REQUIRE SUBMISSION AT THAT TIME OF CERTIFICATE OF DEGREE OF INDIAN BLOOD FROM THE AGENCY WHERE ENROLLED.

TO APPLY: APPLICATIONS AND NOMINATIONS SHOULD BE FORWARDED THROUGH SUPERVISORY CHANNELS TO THE PERSONNEL OFFICER, FIELD ADMINISTRATIVE OFFICE, P. O. BOX 2026, ALBUQUERQUE, NEW MEXICO 87103.

Duties: The incumbent works under the general supervision of the Chief, Inventory and Accounting Reporting Unit. Participates in analytical studies associated with the automating of work processes and in the design and development of data system details for programming requirements. The incumbent has responsibility for system analysis and design and is primarily concerned with how to automate work functions to comply with stated requirements of users or prospective users. Specifications supplied will state the data processing needs of the organization requesting service. Incumbent may

PLAINTIFF'S EXHIBIT 12
UNITED STATES GOVERNMENT

Memorandum

Date: June 27, 1972

To: All IADC Employees
From: Executive Officer
Subject: Weekly Newsletter

General

The Bureau of Indian Affairs has revised its policy in regard to granting preference to Indians in employment. In a telegram to the field offices of the Bureau, the Commissioner states:

"The Secretary of the Interior announced today [June 23, 1972] he has approved the Bureau's policy to extend Indian preference to training and to filling vacancies by original appointment, reinstatement, and promotion. The new policy was discussed with the national president of the National Federation of Federal Employees under national consultation rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This new policy is effective immediately and is incorporated into all existing programs such as the promotion program. Revised manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions of this policy.

(Signed) Louis R. Bruce"

The Personnel Office has advised the Data Center that it is recalling all certificates issued for the filling of positions to determine that the eligibles listed on them meet the terms of the new Bureau policy.

For the information of employees, the following table shows the status of non-Indian/Indian employment as of May 31, 1972 by grade, for each division and the Data Center as a whole:

PLAINTIFF'S EXHIBIT 13

In Reply Refer To:

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIORBUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE

P. O. Box 8327

Albuquerque, New Mexico 87108

MERIT PROMOTION PROGRAM
VACANCY ANNOUNCEMENT

[Nov. 22, 1972]

Position(s): VISUAL INFORMATION SPECIALIST
GS-1084-9, POS. E40.9749ALocation: SOUTHWESTERN INDIAN POLYTECH-
NIC INSTITUTE BRANCH OF INSTRU-
TION, ALBUQUERQUE, NEW MEXICO

Area of Consideration: AREA WIDE

SPECIAL REFERENCES: SEE PARAGRAPH #1
BELOWALL QUALIFIED APPLICANTS WILL RECEIVE
CONSIDERATION WITHOUT REGARD TO RACE,
COLOR, SEX, POLITICS, RELIGION OR NATIONAL
ORIGIN.INDIAN PREFERENCE: IN COMPLIANCE WITH
THE PROVISIONS OF THE INDIAN PREFER-
ENCE ACT AND IMPLEMENTING REGULA-
TIONS, NON-INDIAN OUTSIDE APPLICANTS
(i.e., REINSTATABLES, OR CIVIL SERVICE
REGISTER ELIGIBLES WILL NOT BE USED TO
SUPPLEMENT A PROMOTION CERTIFICATE
IF A QUALIFIED INDIAN PREFERENCE ELI-
GIBLE, ALSO COMPETING FOR INITIAL EM-
PLOYMENT OR REEMPLOYMENT IS ON FILE
AND AVAILABLE.

TO APPLY: APPLICANTS CURRENTLY ON DEPARTMENT OF INTERIOR SHOULD COMPLETE FORM 5-4402 AND SUBMIT THROUGH SUPERVISORY CHANNELS. EACH APPLICATION MUST BE ACCOMPANIED BY A SUPERVISOR'S ASSESSMENT OF POTENTIAL AND SUPERVISOR'S APPRAISAL OF PERFORMANCE (FORM 5-4403). CANDIDATES ON THE ROLES OF OTHER AGENCIES MAY APPLY BY COMPLETING SF-171 AND INCLUDING A SUPERVISORY APPRAISAL AND ASSESSMENT OF POTENTIAL USING LOCAL AGENCY FORMS. INDIAN PREFERENCE ELIGIBLES OF $\frac{1}{4}$ DEGREE INDIAN BLOOD. (OUTSIDE APPLICANTS), MAY RECEIVE CONSIDERATION BY COMPLETING SF-171. A CERTIFICATE OF INDIAN BLOOD MUST ACCOMPANY EACH APPLICATION IF "INDIAN PREFERENCE IN INITIAL APPOINTMENT IS CLAIMED.

FORM 638

1. Applications received within the established closing date will be considered against the above-cited vacancy. Applications rated as "highly qualified" and not selected will be retained after completing this action and will be considered against other like vacancies that may develop. Employees interested in consideration against the above described position or other like positions, should apply for consideration against announcement. Like requirements may not be reannounced for a period of three months following the closing date unless an adequate supply of "highly qualified" candidates is not on file.

PLAINTIFF'S EXHIBIT 14

**MERIT PROMOTION PLAN CERTIFICATE
OF PROMOTABLE CANDIDATES**

Vacancy Announcement No. AAO 25/72 Dated 6/19/72

Date of Certificate 7/9/72 Position Title and Grade Visual Information Specialist, GS-1084-9; Installation, Activity, and Location Southwestern Indian Polytechnic Institute, Br of Instruction, Albuquerque

BEST Qualified Promotable Candidate, listed in alphabetical order PCB Applicant Promotable-GS-9

Clark, David (NMN) (Indian Veteran)

Reason for selection

The certificate AAO 25/72, Audio-Visual Information Specialist, only referred one candidate for consideration. We are requesting that AAO 25/72 be readvertised Bureau-wide for an additional two weeks. This will enable the selecting official the opportunity of considering additional Indian candidates for this position.

per-supervisors request

/s/ [illegible]
Selecting Official

Acting Supt.
Title

7/21/72
Date

PLAINTIFF'S EXHIBIT 15

Illustration 8

**MERIT PROMOTION PLAN CERTIFICATE
OF PROMOTABLE CANDIDATES****Vacancy Announcement No. AAO 25/72 Dated 6/19/72****Date of Certificate 8/25/72, Position Title and Grade Visual Information Specialist, GS-1084-9, Pos. E40.9729A
Installation, Activity, and Location SIPI, Br of Instruction Albuquerque****BEST Qualified Indian Candidates, listed in alphabetical order****Clark, David
Montoya, Tommy E.****Reason for selection****Selecting Official****Title****Date**

PLAINTIFF'S EXHIBIT 17**January 27, 1972****Assistant Superintendent (Administration)****Assistant Superintendent (Instruction)****Education Specialist Position C40.9710A, GS-1710-11**

Due to the situation concerning the employment ceiling and freeze imposed by Area Personnel Office, I am assigning Mr. Ray Brown to be Acting Education Specialist until such time as the Personnel Office will allow us to promote Mr. Brown to this position.

/s/ Jack R. Anderson
Assistant Superintendent, Instruction

cc: Felts
Brown
Valdo
OPF (Brown)

DEFENDANT'S EXHIBIT A

[Aug. 21, 1972]

GC:LEG 1
GLG:rgh

Mr. Nathan T. Wolkomir
President, National Federation
of Federal Employees
1737 H Street, N.W.
Washington, D.C. 20006

Dear Mr. Wolkomir:

This is in response to your recent letter of July 17, 1972, in which you called upon the Civil Service Commission to vigorously enforce the civil service laws. Indeed, this is exactly what we believe we are doing.

We must agree with your statement that in interpreting laws, first recourse must be to the intent of the law as embodied in the legislative history of the law, and then to the canons of interpretation. The clear intent of the legislature at the time of the passing of Indian preference laws was to give Indians more control and influence in the affairs that directly concerned them. It was a positive action, not a negative one serving to deprive all other Bureau of Indian Affairs (BIA) employees of their civil service rights.

The basic responsibility and authority to interpret and implement the Indian preference laws rests with the Department of the Interior and the Department of Health, Education, and Welfare, rather than with our Commission. The most recent of the Indian preference laws, the Indian Reorganization Act of 1934, initially authorized the Secretary of the Interior to implement the section providing for Indian preference. Later, when the responsibility for the Indian Health program was transferred to the Public Health Service, comparable authority for carrying out Indian preference requirements was given to the Surgeon General of the Public Health Service.

However, this is not to say that the Civil Service Commission has relinquished its duty to protect the rights of other civil service employees. In this regard we have been conferring with departmental-level staff of the Department of the Interior and the Department of Health, Education, and Welfare, as well as with representatives of BIA and Indian Health Service (IHS).

I can assure you that the Commission reviewed the matter of Indian preference very thoroughly before furnishing our views to the two Secretaries concerned. For one thing, we appreciated the career aspirations of non-Indian employees of the Indian agencies. For another, we realize we were concerned here with a long-standing interpretation of a law affecting a substantial number of positions. In the end, though, the Commission found it appropriate to agree with the interpretation that preference for Indians applied under this law to promotions, as well as initial appointments.

I can also assure you that we gave careful attention to the Equal Employment Opportunity Act of 1972. Section 717 (a) of that Act provides that "all personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." This section is a general provision of law prohibiting discrimination. The Indian preference laws, however, are specific legislation, directed to a particular group of individuals and a very limited area of Government operations. Since all laws must be interpreted in such a way that interpretations be harmonious, the more specific provisions will take precedence over general provisions. In this instance, it is reasonable to consider that Congress intended preference for Indians in the Indian agencies to be an exception from the general discriminatory prohibitions.

It is certainly true that the Equal Employment Opportunity Act of 1972 was enacted after the Indian preference laws were passed. But it does not follow from this fact alone that the later law takes precedence. When the Equal Employment Opportunity Act was passed, Con-

gress did not specifically repeal Indian preference, as it might well have. Clearly the courts do not look with favor upon implied repeals.

We believe that both laws are consistent, and will continue to watch over the rights of Federal employees under both laws.

Sincerely yours,

Robert E. Hampton
Chairman

GC:GLGODBERG:rgh
t.d. 8/16/72

DEFENDANT'S EXHIBIT B

UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25

Memorandum

To: Director of Personnel.

From: The Solicitor.

Subject: Indian preference in employment.

On December 26, 1946, in connection with a proposed statement involving personnel policy affecting Indian employees, you requested my opinion on the following questions:

- (1) Under the Indian preference and the veterans' preference laws, does a qualified Indian who is not a veteran have preference in employment over a non-Indian veteran?
- (2) Is Indian preference applicable to other than appointment and separation actions? In other words, does Indian preference necessarily apply to promotion from grade to grade within the service? (The second question is understood to refer to cases of promotion to fill a vacancy which might occur either by establishment of a new position or the vacation of an already established position for any reason.)

It is my opinion that affirmative answers are required to both questions.

Section 12 of the Wheeler-Howard Act, also known as the Indian Reorganization Act (48 Stat. 986, 25 U. S. C. sec. 472), provides that:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such *qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.*"
(Emphasis supplied.)

This provision implemented miscellaneous provisions contained in the acts of June 30, 1834 (4 Stat. 737, 25 U. S. C. sec. 45), May 17, 1882 (22 Stat. 88, 25 U. S. C. sec. 46), as amended by the act of July 4, 1884 (23 Stat. 97), August 15, 1894 (28 Stat. 313, 25 U. S. C. sec. 44), and April 30, 1908 (35 Stat. 71, 25 U. S. C. sec. 47), as amended by the act of June 25, 1910 (36 Stat. 861), all of which required preference employment of Indians in various circumstances. Its purpose, to accord a special employment preference for Indians, is reflected in the following statement of Congressman Howard, coauthor, made during the course of debate on the bill (S. 3645):

"In order that the Indian, after being educated in a practical way, may pursue his trade or vocation and be preferred in positions upon Indian reservations, we have set up in the bill reported a preference for him and we have provided and directed a special set-up without regard to the civil-service laws, whereby he can establish a rating for such reservation positions." (78 Cong. Rec. 12164 (1934).)

Section 18 of the Veterans' Preference Act of 1944 (58 Stat. 391, 5 U.S.C. sec. 869), provides that:

"All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regula-

tion, or any department of the Government or officer thereof." (Emphasis supplied.)

Since all of the statutes granting preference rights were enacted prior to the Veterans' Preference Act of 1944, it is clear that such rights were now abrogated by the latter act. Your first question is therefore answered in the affirmative.

I think it is equally clear that the second question requires an affirmative answer. Section 12 refers to the "various positions *maintained, now or hereafter*, by the Indian Office." (Emphasis supplied.) While the excerpt quoted above refers to "positions upon Indian reservations," the language finally enacted extends to all positions in the Indian Service. This fact has been recognized by the Civil Service Commission by placing in an excepted status under Schedule A of the civil-service rules, "Positions in the Bureau of Indian Affairs, Washington, D. C., and in the field, when filled by the appointment of Indians * * * ." In its Minute No. 2, of October 29, 1942, the Commission ruled that these positions, if occupied by Indians, were not brought into the classified service by the Ramspect Act and Executive Order No. 8743. See 78 Cong. Rec. 11123, 11126, 11127, 11137 (1934).

It therefore is my conclusion, under the foregoing statutes, that (1) a qualified Indian who is not a veteran has preference in employment over a non-Indian veteran, and (2) such preference extends to the filling of all vacancies within the service.

MASTIN G. WHITE,
Solicitor.

[CIVIL ACTION No. 327-71]

DEFENDANT'S EXHIBIT C**[SEAL]**

**In Reply Refer To:
BCCO 6746**

**UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242**

[Jun. 25, 1972]

**Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510**

Dear Senator Kennedy:

This is in further reply to your letter of May 7, 1970, also signed by Senators Harris, Mondale, and McGovern, which requested information regarding the employment and training practices of the Bureau of Indian Affairs. (Our letter dated May 19, 1970, indicated this further reply was forthcoming.)

(1) How many Indians and non-Indians are employed by the Bureau of Indian Affairs in each GS rating category? (In the interest of providing the fullest possible information, we have also provided information as it pertains to wage system categories and executive pay.)

Full-Time Employment

<u>General Schedule</u>	<u>Indian</u>	<u>Non-Indian</u>
GS-1	6	—
2	175	7
3	1,302	125
4	1,824	400
5	922	597
6	118	106
7	381	675
8	12	14
9	527	2,195
10	8	65
11	266	921
12	134	693
13	67	327
14	47	239
15	11	53
16	2	4
17	—	2
Sub-total	5,803	6,423

<u>Wage System</u>	<u>Indian</u>	<u>Non-Indian</u>
Less than \$5,000	68	8
\$5,000- 5,499	222	12
5,500- 5,999	359	22
6,000- 6,499	265	49
6,500- 6,999	424	60
7,000- 7,999	539	151
8,000- 8,999	381	201
9,000- 9,999	96	100
10,000-11,999	114	93
12,000-13,999	36	28
14,000-15,999	35	8
16,000-17,999	6	16
18,000-19,999	—	5
Sub-total	2,545	753
Executive Pay	1	—
Grand Total	8,349	7,176

The information given above was taken from the Minority Group Employment Report of November 30, 1969, since this was the most current information the computer could provide. Since that time, the Bureau has under-

gone an executive realignment with corresponding changes in the executive staff. Ten out of sixteen positions were filled with Indians, and plans are to fill six out of the remaining eight executive positions with Indians.

(2) Are on-the-job training programs equally available to Indians and non-Indians? In the past year, how many Indians and non-Indians participated in on-the-job training programs?

The Bureau, by issuance of the Bureau of Indian Affairs Manual, has established a policy of long standing, whereby training is equally available to Indians and non-Indians. There are, however, three programs presently in effect (please see enclosures 1, 2, and 3) which are available only to Indian employees. These programs were established to combat Indian unemployment and accelerate the development of Indian leaders. Participation in these programs was limited to Indians to permit the development of a training format more ideally suited to developmental needs and to facilitate program evaluation. We do not feel that the existence of these programs discriminates against non-Indian employees, since counterpart programs are generally available for all employees.

Bureau training records are set up to report training "instances." Each time an employee—Indian or non-Indian—receives training, this constitutes a training "instance." If, for example, an Indian received training three times in one year, this would constitute three training "instances."

In answering this question and question no. 7, we are reporting training "instances," as this provides a more complete picture of the Bureau's training effort in terms of the amount of training received by Indians and non-Indians.

During the past year, Indian employees participated in on-the-job training in 6,657 instances, and non-Indian employees participated in on-the-job training in 3,296 instances.

The above figures do not include interagency training (training with another Government facility) or non-Government training, as we have placed a strict interpretation on the term "on-the-job." Interagency and non-Government attendance is included in our answer to question 7, which also includes the totals provided by this answer.

(3) How many Indians and non-Indians are in supervisory positions?

One thousand one hundred forty-eight Indians and 2,307 non-Indians are in supervisory positions.

(4) In the past year, how many Indians and non-Indians were promoted? For each group, what was their average period of employment in the grade level prior to promotion?

<u>Indian</u>	<u>Non-Indian</u>
Total no. promoted 1,032	Total no. promoted 982
Average time in grade 38.5 mo.	Average time in grade 40 mo.

(5) Is the Bureau involved in any Management Intern programs? If so, how many Indians and non-Indians are participating?

The Bureau operates two programs which may be termed "Management Intern" programs—"The Indian Administrator Development Program" and the "Bureau Field Management Training Program." (Enclosures 1 and 2). In addition, the Bureau participates in two Departmental Interns which may be termed "Management Intern" programs—"The Consolidated Departmental Management Development Program" and the "Departmental Administrative Management Training Program (enclosure 6).

Due to Fund limitations, participation in these programs has been restricted; however, the division of participation—Indian and non-Indian—has been as follows:

<u>Indian</u>	<u>Non-Indian</u>
8	8

(6) In the past year, how many Indians and non-Indians were hired by the BIA at each GS grade level?

To assure that you receive a complete answer to your question, we are including information relative to employment of wage system personnel. The answer to this question is provided by enclosure 6, which is a computer printout.

(7) What "on-the-job" educational opportunities exist for BIA employees, and how many Indians and non-Indians participated in such programs during the past year? What was the total cost to the Bureau to operate such programs, and how much of that total was expended on Indians and non-Indians?

We have assumed that this question seeks information relative to the Bureau's total training effort—on-the-job training, interagency training, and non-Government facility training. The number of training "instances" as reported, therefore, includes intrabureau on-the-job training (as reported by the answer to your second question), and in addition, "instances" of interagency training (training provided by other Government agencies) and non-Government facility training (training provided by colleges, universities, and other private facilities).

Indian

Total training instances 8,536
Total training cost \$312,161

Non-Indian

Total training instances 10,649
Total training cost \$368,025

Present management of the Bureau is actively seeking to promote the training and upward mobility of Indians. To accomplish this, we are seeking to expand the funding of established programs (please see enclosures 1, 2, and 3), and to establish new programs, as appropriate. In addition, we have taken steps to assure that undertaken training is strictly in accordance with determined need (please see enclosure 8). This procedure, we feel, will assist us in assuring that Indians in need of training will not be neglected.

If we can be of further assistance, please contact us.

Sincerely yours,

/s/ Louis R. Bruce
Commissioner

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5. Personnel Management Letter to the field from Mr. Walter O. Olson, Area Director—Indian Preference—06-23-72
6. Memo to All Bureau Employees from Commissioner Bruce Bureau Policy of Indian Preference—07-03-72
7. Letter to N. T. Wolkowir, President NFFE from Robert E. Hampton—07-03-72
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FILE OF MANNIE FOSTER, ACTING AREA PERSONNEL OFFICER, BUREAU OF INDIAN AFFAIRS, PRODUCED AT THE TAKING OF HIS DEPOSITION OF SEPTEMBER 6, 1972.

[SEAL]

Chairman

**UNITED STATES CIVIL SERVICE
COMMISSION**

WASHINGTON, D.C. 20415

[Jul. 11, 1972, Assistant Secretary, P.L.M.]

[Jul. 3, 1972]

Action Office
For info only

Honorable Rogers C. B. Morton
Secretary of the Interior
Washington, D. C. 20240

Dear Mr. Secretary:

My colleagues and I were pleased to learn that you recently approved a policy providing that Indians are to receive preference to all vacancies in the Bureau of Indian Affairs whether filled by original appointment, reinstatement, or promotion.

The Commission agrees with your interpretation of the Indian preference laws and thus finds your policy reflecting this interpretation to be consistent with programs administered by the Commission. We are gratified that your Department and the Department of Health, Education, and Welfare are now in accord on this issue. We feel it is essential that the Federal government maintain a uniform approach to the application of Indian preference.

One aspect of the new policy causes us some concern and we suggest that it be given special consideration. To non-Indian employees, this is a matter of long-standing statutes suddenly being interpreted differently. After years of working under one set of rules these employees may feel that now their careers are in jeopardy, and with no change in the law to point to as the reason for

the new conditions. As career Federal employees they have a right to expect that they will still be given every opportunity to fulfill their hopes and aspirations as was implied under the conditions which existed at the time they were employed. We urge this will be kept in mind as the new policy is carried out.

If our staff can be of any assistance to you or the Bureau of Indian Affairs in implementing the new policy please call on us.

By direction of the Commission:

Sincerely yours,

/s/ Bob

ROBERT E. HAMPTON
Chairman

[SEAL]

In Reply Refer To:
Personnel Mgmt.

**UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242**

[Jul. 19, 1972]

**[Received, Jul. 24, '72, Area Director's Office—
AAO-BIA]**

Air Mail

Memorandum

**To: Area Directors
 Acting Administrator, Field Support Services
 Office
 Director of Southeast Agencies**

From: Commissioner of Indian Affairs

**Subject: Partial Revision of 44 BIAM 335 Promotion
 and Internal Placement**

The attached draft is being forwarded for your review and comments. The changes for the Promotion Program are in accordance with the policy which was announced on June 23 by the Secretary expanding Indian preference to include promotion and training, as well as initial employment and reinstatement.

The only proposed changes in the Promotion Program are ones to implement preference in promotion consideration. A complete revision of the program will be issued later for comment. Before discussions are held with employees, employee organizations, and tribal groups, we suggest that copies of paragraphs of the current program which

are being changed be furnished the reviewing officials since in some instances only a portion of the paragraph will be revised.

Please submit your comments and suggestions to the Division of Personnel Management not later than August 7, 1972.

/s/ Louis R. Bruce
Commissioner

Attachment

This statement will supersede .1 Policy 44 BIAM 335, 3.1

.1 Policy—An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who meet the established qualification requirements are available for filing a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau.

This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may be filled by transfers, reassignment, reinstatement, or initial appointment.

All items remain the same except for I.

.12 *Content of Announcement*

I. The following statement will be included on each POB issued: "In filling vacancies by promotion, original appointment or reinstatement, priority in selection will be given to candidates who are eligible for Indian preference."

Items A, C, D, E, F, and G remain the same.

.14 *Methods and Procedures for Consideration.*

B. *Applications*

An employee may file for an announced vacancy by submitting an SF-171 through supervisory channels to the appropriate job holding office. The supervisory will complete an evaluation form to attach to the application.

An employee who claims Indian preference is responsible for submitting a certificate of Indian blood with his application if none is currently on record. *Indian preference in promotions will not be considered unless there is a CIB on file.*

.17 A & B are new—pen and ink change renumbering old 17B to 17C; old 17C to 17D; old 17D to 17E.

.17 *Evaluating Eligible Candidates*

All qualified eligible candidates to be considered for a vacancy will be arranged in two groups—Indian and non-Indian.

A. *Method of Evaluating.* Candidates who are basically eligible will be evaluated on a combination of factors dealing with their overall knowledge, skills, education, and experience. Rating panels will be established, unless it is impracticable to do so, in order to rate candidates for positions at GS-5 and above under the Promotion Plan. When rating panels are used in the evaluation process, personnel staff members and the selecting official may serve only in a technical or advisory capacity.

B. *Evaluation of Outside Candidates.* When recruitment efforts are extended to include applications from candidates outside the Federal service and other Federal agencies, these applications will be rated, ranked, and certified in the same manner as employees applying for consideration. When written evaluations are not available, telephone contacts with former or present employers will be documented as the supervisor's evaluation.

This paragraph will supersede entire paragraph .18.

.18. *Ranking and Selection*

A. *Ranking by Category*

1. *Indian candidates.* All Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups—Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates."

2. *Non-Indian Candidates.* All non-Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups—Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates."

B. *Referral of Candidates to Selecting Official (Certification)*

1. Certificates listing the best qualified Indian and non-Indian candidates will be issued simultaneously to the selecting official. Each certificate will be prepared listing the best three to five of the highly qualified candidates. If meaningful distinctions cannot be made among them, as many as 10 names may be certified. All best qualified candidates will be listed in alphabetical order. Applications of qualified Indian candidates whose names are not listed on the "best qualified" certificate will be referred separately to the selecting official for his review.

2. When a non-Indian is selected to fill a vacancy, and Indian candidates have been certified for selection, the selecting official must submit, by memorandum to the servicing Personnel Office, a complete justification as to why the non-Indian has been selected. The justification will be forwarded to the Washington Office, Bureau Manpower

Committee for review and approval by the Commissioner.

3. A selecting official shall not notify a candidate of his selection until the Personnel Office has obtained all necessary clearances.

Statement to include on certificate of non-Indian candidates.

Certificate of non-Indian Candidates

The selection of a candidate from this certificate is subject to approval by the Commissioner if there are qualified Indians available.

[Jul. 3, 1972]

Mr. Nathan T. Wolkomir
President, National Federation of
Federal Employees
1737 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Wolkomir:

This is in reply to your letters regarding the implications of the policy on Indian preference recently established in the Department of Health, Education, and Welfare and the Department of the Interior.

We have been involved in discussions on Indian preference during the past months with representatives of both Departments as well as with representatives of the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA). It is clear from these discussions that the traditional interpretation of the Indian preference laws established through the years by BIA and accepted by IHS when Indian health functions were moved out of BIA has been that persons of Indian descent are entitled to receive preference only in original appointment to positions in the Indian service.

During recent months this interpretation has been challenged on the basis that it does not reflect the full intent of the law. There are many who feel that a proper interpretation of the Indian preference law—which provides that Indians shall have “the preference to appointment to vacancies” in BIA and IHS—requires preference for Indians no matter how vacancies are filled, whether by original appointment, reinstatement, or promotion. The policy now being implemented in IHS and BIA reflects this broader interpretation.

The most recent of the Indian preference laws, the Indian Reorganization Act of 1934, initially authorized the Secretary of the Interior to implement the section of the act providing for Indian preference. In 1955, when responsibility for the Indian health program was trans-

ferred to the Public Health Service, comparable authority for carrying out Indian preference requirements was given to the Surgeon General of the Public Health Service, under the supervision of the Secretary of Health, Education, and Welfare. Therefore, the responsibility and authority to interpret and implement this law rest with Interior and HEW, rather than with our Commission.

We at the Commission have given this question considerable thought and study, however, because we are concerned about the interrelationship between the Indian preference statutes and the competitive service. Our judgment is that in stating their new policy the Departments have correctly interpreted the law and that on this basis preference for Indians in promotion selections is consistent with programs administered by the Commission.

I can understand your interest in the effect of the new policy on the non-Indian employees in these agencies. We have expressed to the Departments our concern for these employees who will suddenly find long-standing statutes interpreted differently. We have suggested that every effort be made to assure that these employees have an opportunity to fulfill their hopes and aspirations for the future. Although the legislation does not authorize us to regulate the application of Indian preference, we plan to work closely with agency officials to assist them in assuring that promotion programs carry out merit principles at the same time they are responsive to the Indian Reorganization Act.

I hope this information is helpful to you. If you have any additional questions, please do not hesitate to contact me.

Sincerely yours,

/s/ Robert E. Hampton
 ROBERT E. HAMPTON
 Chairman

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[SEAL]

In Reply Refer To:

[Jul. 3, 1972]

Memorandum

To: All Bureau Employees

From: Commissioner of Indian Affairs

Subject: Bureau Policy of Indian Preference

On June 23 Secretary Morton announced his approval of this Bureau's proposal to expand the application of Indian preference to include training and promotions, as well as initial employment and reinstatement. In regard to filling positions, the policy provides as follows: where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy.

The new policy has been endorsed by officials of the Civil Service Commission and the Department of the Interior in regard to its basis in Federal statute as well as its effect in furthering the cause of Indian self-determination. We are agreed that it is a proper part of the Bureau's mission. The expansion of Indian preference will basically be a means of enhancing opportunities for Indians in the operation and management of the Bureau's programs, a goal which is consistent with President Nixon's announced policy of increased self-determination in Federal and local matters affecting Indian people.

At the same time, non-Indian employees are assured that this expansion of Indian preference in no way jeopardizes their present jobs or current status. It is not the intention of the Department or the Bureau to hamper the

rights of any employees, either Indian or non-Indian. This Bureau and the Indian people whom it serves will continue to need the talent, skill, and dedication which non-Indian employees have displayed over the years. Therefore, I stress our intention to maintain the rights of all employees and our desire for a continuation of each employee's best efforts in our important programs.

/s/ Louis R. Bruce
Commissioner

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P.D. Box 8327
Albuquerque, New Mexico 87108

[Jun. 28, 1972]

PERSONNEL MANAGEMENT LETTER NO. 72-13
(300, 335, 410)

Subject: Indian Preference

Incorporated in this letter is the content of a teletype received from Commissioner Bruce at 4:30 p.m., Monday, June 26, 1972. The nature of the teletype is self-explanatory. Further clarification will be made by issuance of Bureau Manual release. This information is to be made known to all employees under your jurisdiction.

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will

be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy."

/s/ Walter O. Olson
Area Director

DISTRIBUTION:

A & B

GOVERNOR, PUEBLO OF ZUNI

RAMAH NAVAJO AGENCY

COCHITI PROJECT COORDINATOR

ROSWELL TRAINING CENTER

DENVER FIELD EMPLOYMENT ASSISTANCE OFFICE

Unions: Mescalero

Jicarilla

AIS

National Council BIA Educators

OFFICE OF THE SECRETARY

For Release to PM's, June 23, 1972

INTERIOR EXPANDS POLICY OF INDIAN PREFERENCE IN BUREAU OF INDIAN AFFAIRS

Secretary of the Interior Rogers C. B. Morton today announced that he has approved recommendations of Bureau of Indian Affairs Commissioner Louis R. Bruce to extend the policy of Indian Preference to filling vacancies, whether by original appointment, reinstatement or promotion.

In addition, greater emphasis on training efforts will be directed toward the development of Indians. The changes will be effective immediately within the Bureau of Indian Affairs.

"A careful review of statutes covering Indian Preference has led us to the conclusion that our past practice of giving preference in the Bureau of Indian Affairs in cases of new hire and reduction in force should be extended to include the filling of all vacancies," Secretary Morton said.

Secretary Morton stressed that in the implementation of this new policy, careful attention will be given to protecting the rights of non-Indian employees to the greatest extent possible within statutory requirements.

The new policy is in support of President Nixon's program for Indians, and is designed to enable Indian personnel in the Bureau of Indian Affairs to progress as rapidly as their capabilities allow.

Implementing procedures are now being prepared by the Bureau of Indian Affairs.

Action:

Info:

Accounting Classification

Date Prepared

Type of Message

FOR INFORMATION CALL

☐ Single☐ Book☐ Multiple-Address

Name

Phone Number

This Space for Use of Communication Unit

MESSAGE TO BE TRANSMITTED
(Use double spacing and all capital letters)

Teletype Received: (June 26, 1972 @ 4:30 p.m. by lmc)

To: Walter O. Olson, Area Director

From: Louis R. Bruce, Commissioner, Washington, D.C.

The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the department. Secretary Morton and I jointly stress that careful attention must be given to protecting the rights of non-Indian employees. The new policy provides as follows:

Where two or more candidates who meet the established requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy.

[MAY 26, 1972]

Memorandum

To: Secretary of the Interior

From: Assistant Secretary-Management and Budget

Subject: Indian Preference Policy

The enclosed Indian preference policy recommended by Commissioner Bruce on September 23, and concurred in by Secretary Loesch on September 27, 1971, was discussed and considered by the Budget and Policy Committee on May 18.

The Committee recommends that you approve Commissioner Bruce's recommendations. We find the Commissioner's policy on Indian preference to be in support of the President's Indian policy.

/s/ Richard S. Bodwar

Enclosure

Approved: June 22, 1972

/s/ Rogers C. B. Morton
Secretary of the Interior

[September 27, 1971]

To: Secretary of the Interior

From: Assistant Secretary Loesch

Re: Indian Preference Policy

I have initialled the within memorandum, but this is a serious policy question for the Department and should be the subject of a briefing and discussion with you.

It is my view that participants in such a meeting should be you, Crow, Bruce, Rogers, Molich, Eitt, Pecora and myself.

/s/ [Illegible]

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[September 23, 1971]

Memorandum

To: Secretary of the Interior

Through: Assistant Secretary, Public Land Management

From: Commissioner of Indian Affairs

Subject: Indian Preference Policy

Indian preference is becoming a matter of ever increasing concern to the Bureau, its employees, and the Indian people. It has on several occasions been the basis for formal complaints of discrimination wherein complainants have alleged failure on the part of Bureau Management to comply with the intent of the Indian preference statutes. At least two suits against the Bureau and the Department have been filed in Federal Courts on this basis. The U.S. Public Health Service-Division of Indian Health has recently proposed changes in the interpretation and application of existent Indian preference policy. In addition, the Civil Service Commission has also shown an interest in the application of Indian preference statutes.

Indian preference is currently interpreted to apply to initial appointments and reinstatements only. In addition, the Bureau and the Department, with the concurrence of the Civil Service Commission, have administratively extended preference to reduction-in-force actions. The Bureau has recently undertaken a review of the legislative history of Indian preference in an effort to determine the validity of its present policy on the subject.

As a result of this review we believe that at the time the various statutes were enacted Congress intended that Indian preference be applicable to the filling of all vacancies in the Indian Service whether by initial appointment, promotion, or reinstatement. Accordingly, we have

developed the attached proposed policy statement which will establish revised policy in accordance with the original intent of the statutes.

In the Solicitor's review of our proposed policy we need to know which provisions of the proposed policy are mandatory and which are discretionary.

/s/ Louis R. Bruce
Commissioner

Enclosure

DEFENDANT'S EXHIBIT D

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

[Jul. 30, 1970]

My Fellow Employees:

I am deeply concerned about the reports I have received of poor morale in the Bureau. I understand this is in a large part caused by the impression that the Bureau no longer offers career opportunities for its employees. Indian employees feel that their opportunities are thwarted. Equally strong views are held by non-Indian employees who feel that opportunities for them have been eliminated or sharply curtailed. Unfortunately, statements and actions have contributed to these views.

I recognize the difficulty in convincing you that we do want, and intend to have, a personnel management program which provides opportunity for all employees, while giving special attention to responsibilities to Indians. With this objective in mind, I have issued instructions for a review of personnel policies and procedures to (1) place maximum attention on Indian preference in initial employment; (2) provide maximum training and development opportunities for all employees, while augmenting regular training resources to give special attention to needs of Indian employees; and (3) assure advancement opportunities on merit promotion principles, with safeguards to assure that this is achieved.

The success of our programs is directly dependent upon the efforts of each of you. I congratulate you on the remarkable job you have done, often under trying circumstances. I am proud of you. Please help us renew the confidence of all employees that the Bureau offers opportunities both for service and a career experience.

/s/ Louis R. Bruce
Commissioner

DEFENDANT'S EXHIBIT E

The following tables represent the number of Indians and non-Indians, classified by GS Grade and Wage Board level, employed by the BIA in November 1969:

<u>GS Grade</u>	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
1	6	0	6
2	175	7	182
3	1,302	125	1,427
4	1,824	400	2,224
5	922	597	1,519
6	118	106	224
7	381	676	1,056
8	12	14	26
9	527	2,194	2,722
10	8	65	73
11	266	921	1,187
12	134	694	827
13	67	327	394
14	47	239	286
15	11	53	64
16	2	4	6
17	0	2	2
	<u>5,802</u>	<u>6,423</u>	<u>12,225</u>

<u>Wage Board</u>	<u>Inds.</u>	<u>Non-Ind.</u>	<u>Total</u>
Less than \$5,000	68	8	76
\$ 5,000- 5,499	222	12	234
\$ 5,500- 5,999	359	22	381
\$ 6,000- 6,499	265	49	314
\$ 6,500- 6,999	424	60	484
\$ 7,000- 7,999	539	151	690
\$ 8,000- 8,999	381	201	582
\$ 9,000- 9,999	96	100	196
\$10,000-11,999	114	93	207
\$12,000-13,999	36	28	64
\$14,000-15,999	35	8	43
\$16,000-17,999	6	16	22
\$18,000-19,999	0	5	5
	<u>2,545</u>	<u>753</u>	<u>3,298</u>

Totals:

	<u>BIA Data</u>		<u>Total</u>
	<u>Inds.</u>	<u>Non-Ind.</u>	
GS Employees	5,802	6,423	12,225
Wage Board	2,545	753	3,298
	<u>8,347</u>	<u>7,176</u>	<u>15,523</u>

DEFENDANT'S EXHIBIT F

The following table represents the percentage of permanent Indian employees in the Bureau of Indian Affairs (BIA) in the years shown:

1941	51
1945	44
1946	56
1951	57
1952	53
1961	53
1962	53
1967	44
1969	48
1970	54

Name of Agency	Precedence	Security Classification
	Action:	
	Info:	
Accounting Classification	Date Prepared	Type of Message
FOR INFORMATION CALL		<input type="checkbox"/> Single
		<input type="checkbox"/> Book
Name	Phone Number	<input type="checkbox"/> Multiple-Address
This Space for Use of Communication Unit		

MESSAGE TO BE TRANSMITTED
(Use double spacing and all capital letters)

Teletype Received: (June 26, 1972 @ 4:30 p.m. by lmc)

To: Walter O. Olson, Area Director

From: Louis R. Bruce, Commissioner, Washington, D.C.

The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian Preference to training and filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the rights of non-Indian employees. The new policy provides as follows:

Where two or more candidates who meet the established requirements are available for filing a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions under this policy.

DEFENDANT'S EXHIBIT G

FORM 5-4408
July 1969

PROMOTION CERTIFICATE

CERTIFICATION OF BEST QUALIFIED CANDIDATE

Announcement No. FAO 34-72 Date 09-26-72

Position Title and Grade Voucher Examining Supv.,
GS 0540-07

Installation, Activity and Location Div. of Financial Man-
agement, Albuquerque, N.M.

BEST qualified candidates, list in alphabetical order

BALENQUAH, CLIFFORD T.—Selected

INDIAN CANDIDATES

CARR, WALTER J.
CHERINO, JOHN S.
CLOUD, BARBARA B.
EUSTACE, ROBERT
FOSTER, RICHARD D.
MONTAYA, JOSEPHINE A.
ONDELACY, WILLIAM D.

Reason for Selection

Performance indicates this employee has the ability to succeed in this position. His experience and training provide the necessary background to insure he will perform as a supervisor in an exemplary manner. His communicative skills are above average which will be an asset in this position. It is obvious he gets along well with workers and is able to answer vendor inquiries to their satisfaction.

Release No. 44-148 6-26-69

/s/ [Illegible]

DEFENDANT'S EXHIBIT H

FORM 5-4408

July 1969

PROMOTION CERTIFICATE

CERTIFICATE OF BEST QUALIFIED
CANDIDATES

Announcement No. FAO 34-72 Date 09-26-72

Position Title and Grade Voucher Examining Supv.,
GS 0540-07Installation, Activity and Location Div. of Financial
Mgn., Albuq., N.M.

BEST qualified candidates, list in alphabetical order

DORCAS, ANNA M.—Inhouse Candidates

NON-INDIAN CANDIDATES

WORTEN, IRENE D.

DURAN, MAGDALENA C.—Outside Candidates

ROLLER, WANDA L.

Reason for Selection

Release No. 44-148 6-26-69

DEFENDANT'S EXHIBIT I

FORM 5-4408
July 1969

PROMOTION CERTIFICATE

CERTIFICATE OF BEST QUALIFIED
CANDIDATES

Announcement No. FAO 33-72 Date 09-26-72
Position Title and Grade Voucher Examining Supv.,
GS 0540-07

Installation, Activity and Location Div. of Financial
Mgn., Albuquerque, N.M.

BEST qualified candidates, list in alphabetical order

DORGAS, ANNA M.—Inhouse Candidates

NON-INDIAN CANDIDATES

WORTEN, IRENE D.

DURAN, MAGDALENA C.—Outside Candidates

ROLLER, WANDA L.

Reason for Selection

Release No. 44-148 6-26-69

DEFENDANT'S EXHIBIT J

FORM 5-4408

July 1969

PROMOTION CERTIFICATE

CERTIFICATE OF BEST QUALIFIED
CANDIDATES

Announcement No. FAO 33-72 Date 09-26-72
 Position Title and Grade Voucher Examining Supv.,
 GS 0540-07

Installation, Activity and Location Div. of Financial
 Mgn., Albuq., N.M.

BEST qualified candidates, list in alphabetical order

BALENQUAH, CLIFFORD T. INDIAN CANDIDATES

CARR, WALTER J.

CHERINO, JOHN S.

CLOUD, BARBARA B.

EUSTACE, ROBERT

FOSTER, RICHARD D.

MONTOYA, JOSEPHINE A.—Selected

ONDELACY, WILLIAM D.

Reason for Selection

This employee is a mature, dedicated and conscientious employee. I have observed her on an acting supervisory capacity and I believe with additional supervisory training she will make an above the average supervisor. Her experience qualifies her as a trained expert and she is able to communicate this knowledge to the field in a most satisfactory manner. She gets along well with co-workers especially those within her own [illegible].

Release No. 44-148 6-26-69

/s/ [Illegible]

DEFENDANT'S EXHIBIT K

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
SOUTHWESTERN INDIAN POLYTECHNIC INSTITUTE
P. O. Box 10146—9169 Coors. N.W.
Albuquerque, New Mexico 87114

[November 21, 1972]

Memorandum

To: Area Director, Albuquerque Area Office
Attn: Mae S. Hall, Personnel Staffing & Employee Relations Specialist

From: Assistant Superintendent (Administration)

Subject: Visual Information Specialist GS-9 Position

On June 19, 1972, we advertised the position of Visual Information Specialist GS-1084-9, number E40.9749A with a cut off date of June 27, 1972.

Upon receipt of the Certificate of Eligibles by the Albuquerque Area Personnel Office, management at the Institute made a decision after evaluation of the staffing pattern in the Instructional Materials Center and availability of funds, it was our decision not to fill the position; therefore, we notified Area Personnel about our decision during the month of September.

/s/ James V. Pouhill
Assistant Superintendent
Administration

DEFENDANT'S EXHIBIT L

[SEAL]

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
P. O. Box 8327
Albuquerque, New Mexico 87108

[August 11, 1972]

Memorandum

To: Superintendent, SIPI
From: Area Personnel Officer
Subject: Priority Referral Certificate

Maria B. Andronicos has rights to priority consideration as specified in FPM 335, Subchapter 4-3 C(2), and BIAM Personnel Management Letter No. 70-52 (335), dated August 12, 1970.

The above employee's application is enclosed for your review and special consideration.

Please indicate in the space provided whether you wish to select this employee for your position or to proceed with efforts to recruit.

- () It has been determined to select the above mentioned employee.
(x) Proceed with efforts to recruit.

/s/ Jack R. Anderson
Signature

08/11/72
Date

Acting Superintendent
Title

Enclosure

DEFENDANT'S EXHIBIT M

1-480

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

Washington, D.C.

November 20, 1972

Pursuant to Title 28, Section 1733, United States Code, I hereby Certify that each affixed paper is a true copy of a document comprising part of the official records of The Department of the Interior: Copy of Memorandum to Commissioner of Indians Affairs from Assistant Secretary-Management and Budget dated December 30, 1972 regarding Implementation of New Indian Preference Poli-

In TESTIMONY WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed on the day and year first above written.

[SEAL]

Deputy Director of Management Operations

/s/ [Illegible]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

[Oct. 30, 1972]

Memorandum

To: Commissioner, Bureau of Indian Affairs
From: Assistant Secretary-Management and Budget
Subject: Implementation of New Indian Preference
Policy

Your proposed procedures implementing the new policy extending Indian preference into promotions have been reviewed by this office. The attached procedures, which have been amended to conform to Departmental policy, are approved for implementation in the Bureau.

We understand the difficulties faced by your staff in developing these procedures. The new Indian preference policy and procedures will have a significant impact on employment practices in the Bureau. Their development has required a special sensitivity to this impact to insure the application of preference on an equitable basis within statutory limitations.

Training

Your covering memorandum of August 14 and the proposed procedures addresses the issue of preference in training. Although the policy statement approved by the Secretary on June 22, 1972, provided for greater emphasis on training for the development of Indian employees, it did not extend absolute preference into training. By letter dated July 5, 1972, Chairman Hampton of the Civil Service Commission endorsed our new Indian preference policy. We have since had discussions with members of the Commission staff and they point out that Chairman

Hampton's endorsement of our policy did not include an endorsement of preference in training.

Training will continue to be performed in accordance with Federal training policy and Chapter 41 of Title 5, USC, i.e., to meet the immediate and long-range needs of the agency. Any reference to Indian preference in training must be deleted from Bureau issuances.

Promotions, Reinstatements and Initial Appointments.

The statement of policy outlined in the Bureau's implementing procedures states in the last sentence, first paragraph: "Positions may be filled by transfers, reassignments, reinstatement, or initial appointment, but Indian preference applies in all cases except (1) when the Commissioner makes an exception and (2) in lateral transfer and reassignment before a Promotional Opportunity Bulletin is issued."

The policy statement approved by the Secretary extended Indian preference in to filling of vacancies by original appointment, reinstatement, and promotion. Transfers into the Bureau from other Federal agencies should be considered original appointments to the Bureau rolls and therefore subject to the same requirements as original appointments as far as Indian preference is concerned. The noncompetitive reassignment of employees within the Bureau was not covered by the policy statement. We believe that the application of Indian preference in lateral reassignment actions would restrict unnecessarily your authority to reassign employees as the needs of Bureau programs may dictate. Since the non-competitive lateral reassignment (actions which do not result in reassignment to a position with known promotional potential) would not place an employee in a better competitive position for advancement, preference would serve no useful purpose. Therefore, such actions should be exempt from the Indian preference requirements. However, there will be instances when an employee is reassigned to a position with known potential for advancement. In making a reassign-

ment of this nature, Indian preference must be applied, since a promotion would ultimately result. We have amended the approved procedures accordingly.

Keeping Employees Informed.

You proposed to provide a copy of the justification for selecting a non-Indian employee to each candidate or applicant who was not selected from a promotion certificate. It is our opinion that such action would have no value. In addition, Federal Merit Promotion Policy, contained in FPM Chapter 335, states that: "An employee is not entitled to see an appraisal of another employee." Since the justification for selecting a non-Indian employee for promotion would of necessity take the form of an evaluation or appraisal of his capabilities to perform in a particular position, such justification would be inappropriate for distribution to all candidates. We have deleted this statement from your procedures.

Exceptions to Indian Preference in Promotion.

Exceptions to the Indian preference policy are expected to be limited, according to the approved policy. It is contemplated that exceptions will be granted only in those rare instances where the qualifications of a non-Indian candidate for promotion are so superior to competing Indian candidates that a decision not to select him will jeopardize the success of a program or project. We feel that it is important to all employees that the credibility of the Indian preference policy be maintained. Any exceptions will be subjected to close scrutiny by Indian and non-Indian employees alike. It is important, therefore, that the Commissioner grant exceptions only in instances which fully meet the stated requirement of the policy.

/s/ [Illegible]

Enclosure

I. Policy—An Indian has preference in initial appointment, including lateral transfer from outside the Bureau, reinstatement, and promotion. To be eligible for preference, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who meet the qualification requirement are available for filling a vacancy, if one of them is an Indian, he shall be given the preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau. Positions may be filled by transfer, reassignment, reinstatement, or initial appointment, but Indian preference applies in all cases except (1) when the Commissioner makes an exception and (2) in reassignment within the Bureau.

The Promotion Program does not restrict the right of management to fill positions by methods other than through promotion.

All items remain the same except for I.

.12 Content of Announcement

I. The following statement will be included on each POB issued: "In filling this vacancy by promotion, initial appointment, lateral transfer from outside the Bureau, or reinstatement, priority in selection will be given to candidates who present proof of eligibility for Indian preference. A Certificate of Indian Blood must be part of the official personnel record of an applicant who claims Indian preference."

Items A, C, D, E, F, and G remain the same

.14 Methods and Procedures for Consideration.

B. Applications

An employee may file for an announced vacancy by submitting an SF-171 through supervisory channels to the appropriate job holding office. The supervisor will complete an evaluation form to attach to the application and forward it to the Personnel Office for submission to the job-holding Personnel Office.

An employee who claims Indian preference is responsible for submitting a Certificate of Indian Blood with his application if none is currently on record. Employees are responsible for submitting a CIB to the job-holding Personnel Office, if other than their current servicing Personnel Office. Indian preference in promotion will not be considered unless there is a CIB on file for the applicant claiming preference.

Items A & B are new—pen and ink changes renumbering old 17B to 17C; old 17C to 17D; and old 17D to 17E.

.17 Evaluating Eligible Candidates

All qualified candidates to be considered for a vacancy will be arranged in two groups—Indian and non-Indian.

A. Method of Evaluating. Candidates who are basically eligible will be evaluated on a combination of factors dealing with their overall knowledge, skills, education, and experience. Rating panels will be established, unless it is impracticable to do so, in order to rate candidates for positions at GS-5 and above under the Promotion Plan. When rating panels are used in the evaluation process, personnel staff members and the selecting official may serve only in a technical or advisory capacity.

B. Evaluation of Outside Candidates. When recruitment efforts are extended to include applications

from candidates outside the Federal service and other Federal agencies, these applications will be rated, ranked, and certified in the same manner as Bureau employees applying for consideration. When written evaluations are not available, telephone contacts with former or present employers will be documented as the supervisor's evaluation.

This paragraph will supersede entire paragraph .18

.18 Ranking and Selection

A. Ranking by Category

1. Indian candidates. All Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups—Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates." The best qualified will be selected from the Highly Qualified group.

2. Non-Indian Candidates. All non-Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups—Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates." The best qualified will be selected from the Highly Qualified group.

B. Referral of Candidates to Selection Official (Certification)

1. Three to 5 of the best qualified Indian candidates will be listed on the certificate. If meaningful distinctions cannot be made among the best qualified candidates as many as 10 names may be certified.

2. Where there are no best qualified Indian candidates available, 3 to 5 of the best qualified non-Indian candidates will be certified together with

all qualified Indian candidates. Consideration of non-Indians will not be made until all qualified Indians have been considered. Selection of a best qualified non-Indian candidate, when there are qualified Indian candidates on the certificate, will require approval by the Commissioner as an exception to the Indian preference policy.

- C. Exceptions. Requests for approval of the selection of a non-Indian will be submitted to the Commissioner. Exceptions will be granted only in those rare instances where the qualifications of a non-Indian candidate for promotion are so superior to competing Indian candidates in relation to job requirements, including any special needs, that a decision not to select him will jeopardize the success of a program or project.

1. Justification for Exception. A complete justification of why the selected non-Indian has superior qualification to the qualified Indian shall be submitted to the Washington Office together with the certificate of eligibles, applications, and supervisors evaluations.

CERTIFICATE OF ELIGIBLES

BEST QUALIFIED INDIAN CANDIDATES

QUALIFIED INDIAN CANDIDATES (may not be selected when best qualified Indians are available)

BEST QUALIFIED NON-INDIAN CANDIDATES (The selection on a non-Indian candidate is subject to approval by the Commissioner if there are qualified or best qualified Indian candidates available)

Selecting Official

[2]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THREE JUDGE CASE

Case No. 9626 Civil

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT
and JULES COOPER, on behalf of themselves and all
others similarly situated, PLAINTIFFS,

—vs—

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office, DEFENDANTS.

APPEARANCES

For the Plaintiffs:

COTTER, ATKINSON, CAMPBELL & KELSEY
Attorneys at Law
By John M. Kulikowski
1300 Bank of New Mexico Building
P. O. Drawer 1126
Albuquerque, New Mexico 87103

For the Defendants:

HON. VICTOR R. ORTEGA
United States Attorney
P. O. Box 607
Albuquerque, New Mexico 87103
LOTARIO D. ORTEGA
Attorney at Law
Department of Interior
Albuquerque, New Mexico

[3]

For the Intervenor, Amerind:

DINEBEIINA NAHIILNA BE AGADITAHE, INC.

By Alan R. Taradash

Attorney at Law

Post Office Box 306

Window Rock, Arizona 86515

SHERMAN & SHERMAN

Attorneys at Law

By Harris Sherman

1180 Capital Life Center

Denver, Colorado

RICHARD B. COLLINS

Attorney at Law

Box 116

Crownpoint, New Mexico 87313

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled and numbered cause came on for Final Hearing on the Merits before the HONORABLE OLIVER SETH, United States Circuit Judge; HONORABLE HOWARD C. BRATTON, United States District Judge; and HONORABLE EDWIN L. MECHEM, United States District Judge, at Albuquerque, New Mexico on the 29th day of November, 1972, at 9:00 o'clock A.M.;

That the Plaintiffs appeared in person and by their attorney of record, as set forth above;

That the Defendants appeared by their attorney of record, as set forth above, and the following proceedings were had:

NOTE: Unless otherwise indicated, the "Court" refers to Judge Seth.

[i]

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[iii]

EXHIBITS

PLAINTIFFS' EXHIBITS

	MARKED	OFFERED	ADMITTED
No. 10—Total of Promotions		82	83
11—Vacancy Announcement	6	9	10
12—Newsletter (1st page)	8	10	10
13—POB		50	50
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[4] THE COURT: Good morning. We will hear the Mancari versus Morton case. Are the parties ready this morning?

MR. KULIKOWSKI: The Plaintiff is ready, Your Honor.

MR. SHERMAN: Your Honor, the Intervenor is ready.

THE COURT: You may proceed.

MR. KULIKOWSKI: May it please the Court, Plaintiffs would like to make a very brief opening statement at this time.

If the Court please, my name is John Kulikowski, I am an attorney for the Plaintiffs in this class action suit. Your Honor, in the sake of saving time and in view of the fact that this matter was heard at a Motion for Preliminary Injunction, we feel that a good deal of time can be saved because of the fact that a good deal of evidence is already before the Court as a result of that hearing.

For the most part in this case, the factual matters are not in great contention. The parties agree on a good many things. The Plaintiffs wish to call a series of witnesses centering around four incidents. Our purpose for calling these witnesses will be to show two things. First of all, to show that the policy has been implemented on a broad scale, and secondly, that the policy, as implemented, has caused harm to the members of the class which the Plaintiffs represent.

As an incidental matter we might mention that the exhibits today will be numbered consecutively, taking over where the numbers left off at the Preliminary Injunction.

[5] THE COURT: Do you wish to make any statement, Mr. Ortega?

MR. ORTEGA: Not at this time, Your Honor.

THE COURT: Very well, you may proceed, counsel.

MR. KULIKOWSKI: The Plaintiffs would like to call Miss Nancy Johnson.

NANCY JOHNSON

a witness, having been first duly sworn according to law, upon her oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please, for the Court?

A Nancy Johnson.

Q Where are you employed, Miss Johnson?

A The Bureau of Indian Affairs, I.D.C.

Q What is an I.D.C., for the record?

A That's the Indian Affairs Data Center.

Q How long have you been with the Bureau of Indian Affairs?

A It will be six years this coming February.

Q Are you familiar with the new Indian Preference Policy that was announced this past June?

A Yes, I am.

Q Do you qualify for the Indian Preference yourself?

A No, I did not.

Q Miss Johnson, did you have opportunity to apply for a [6] position or a vacancy entitled Computer Systems Analyst GS-334-9.

A Yes, I did.

Q When was that that you applied for that?

A Sometime in April.

Q Of 1972?

A Of 1972.

(Whereupon, Plaintiffs' Exhibit No. 11 was marked for identification.)

Q I hand you something marked Plaintiffs' Exhibit Number 11, which is a vacancy announcement, and ask you if you recognize that announcement.

A Yes, I do.

Q Was this the vacancy for which you applied for the Computer Systems Analyst position?

A That is correct.

Q Did you receive that promotion or did you fill that vacancy?

A No, I didn't.

Q What grade level would that position have been?

A GS-9.

Q What was your GS rating at the time?

A At the time my GS rating was a GS-5.

Q What was the outcome of your application?

A They had recalled all the certificates after the new [7] Indian policy was put through.

Q Was your name contained on a certification that came out subsequent to the POB being issued?

A Yes, it was.

Q Do you recall when that was?

A Oh, may I—

Q Certainly?

A Would you restate that again? Prior to the POB or subsequent?

Q No, subsequent.

A Oh, subsequent. Yes, it was.

Q Do you recall when that certificate came out?

A I believe it was 5-26 was the first certificate.

Q So that would be May 26th of 1972?

A That is correct, yes.

Q Was your name listed in any particular way on that certificate?

A Eligible for promotion.

Q Did the policy announcement have any impact on the action taken on this certificate, to the best of your knowledge?

A Yes. They recalled the certificate.

Q Would you tell us the events and what you know personally about that incident?

A Well, I guess the first knowledge I had is when it came out in our weekly newsletter. Well, the first [8] knowledge was when Secretary Morton had released his new Indian policy, shortly after that in the newsletter the Personnel Department announced they were recalling all certificates. I was very concerned because

I was a non-Indian, I had been interviewed and I was very concerned. This did affect me. So, therefore, I went to my EEO counselor and started questioning this.

Q Who was that counselor?

A Tony Franco.

(Whereupon, Plaintiffs' Exhibit No. 12 was marked for identification.)

MR. ORTEGA: Your Honor, in the interest of saving time with respect to this type of testimony, we have admitted in our Answer that we have implemented this new policy. I don't think there's a factual case or issue about all this.

THE COURT: I think they're probably entitled to put on evidence if they wish, if it is limited and not cumulative.

MR. KULIKOWSKI: Yes, Your Honor, we will make every effort to avoid duplication or cumulation of evidence. I think the big issue that the Defendants and Plaintiffs are at issue over is whether harm was caused. We feel in attempting to show that, we have to lay some foundation as to the background that led up to it.

Q (By Mr. Kulikowski) Miss Johnson, I hand you something [9] marked Plaintiffs' Exhibit Number 12 and ask you if you recognize that particular exhibit.

A Number 12?

Q Yes.

A Yes, I do.

Q Is this the newsletter you referred to?

A That is correct.

Q And this is the newsletter that put you on notice that the certificates were being recalled?

A That is correct.

Q After you approached your EEO counselor, what was the result of your contact with him?

A By "result," do you mean we had the meetings, if that's what you are referring to?

Q What was the outcome or the result of those meetings?

A Well, they had recalled the certificates. They had reissued a new certificate.

Q Did your name appear on that new certificate?

A Yes, it did.

Q Were there any names that appeared on that new certificate that were not on the first certificate?

A Correct.

MR. KULIKOWSKI: Your Honor, at this time we would move the admission of Plaintiffs' Exhibits 11 and 12, the POB and the newsletter.

[10] MR. ORTEGA: May I see 12, Your Honor?

MR. KULIKOWSKI: Your Honor, I would like to modify that offer of documentation. It seems that the first page just appeared on the exhibits listed to the counsel and the Court, and we would just move the admission of the first page of Exhibit 12.

MR. SHERMAN: Amerind has no objection to the admission of Exhibits 11 and 12.

MR. ORTEGA: We have no objection at this time. However, we will have testimony on it. I think there's an inaccuracy in Exhibit 12.

THE COURT: They will be admitted.

(Whereupon, Plaintiffs' Exhibits 11 and 12 were admitted in evidence.)

MR. KULIKOWSKI: Your Honor, I have no further questions of this witness at this time.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mrs. Johnson, you have been with the Bureau of Indian Affairs six years, is that correct?

A It will be six years.

Q At the time that you applied for this promotion you were a GS-5, I believe you said?

A That is correct.

Q Are you still a GS-5?

[11] A That's correct.

Q And this promotion would have been to a GS-9 position?

A That is correct.

Q What, actually, is your job at this time?

A Actually I'm a, I guess a computer technician.

Q In that connection, what do you do?

A We prepare data for input into the computer.

Q Have you been doing this type of work with the Bureau for six years?

A No.

Q You have had other jobs?

A Yes.

Q With the Bureau of Indian Affairs? What other work have you done with the Bureau?

A I was actually a computer operator. I had taken a downgrade prior to this POB about last February.

Q And a POB is a Promotion Opportunity Bulletin, is that correct?

A That is correct.

Q You say you took a downgrade from what?

A From a GS-7.

Q From a GS-7 to a GS-5?

A Yes.

Q Why was that?

A Well, because of my daughter. In the computer room we [12] work rotating shift and in order to work a straight day shift, in order to get a straight day—

Q For personal reasons?

A That is correct.

Q You cannot do the work in this other position?

A Because of the hours, yes.

Q So you have, I take it then, GS-7 is the highest level that you have achieved—

A Yes.

Q —in Government service? You are under Civil Service, are you not?

A That is correct.

Q And under Civil Service it's possible for you to transfer to other agencies if positions exist, that's correct?

A That is correct.

MR. ORTEGA: That's all I have.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mrs. Johnson, just a few brief questions. Relating to this first certification sheet that your name appeared on, do you know precisely how you were ranked? Were you ranked as Qualified or Best Qualified on that sheet? Do you remember?

A Oh, I am not really sure. I imagine it would be, in order to be certified you would have to be Highly Qualified.

[13] Q Were any other names on that certificate?

A Yes, there were.

Q Were any of these persons Indian?

A I don't know about the people from the Registrar, I really don't.

Q So you are not certain?

A I am really not certain.

Q You are not certain whether any of the other persons on that certification sheet had qualifications which were equal to or better than yours?

A No, I can't actually say.

Q Do you know what the Excepted Service is within the Bureau of Indian Affairs?

A Yes.

Q Can you briefly explain that?

A Well, to my understanding, maybe I am not too clear on it, if you are of Indian blood you are accepted into the Bureau.

Q Does one in the Excepted Service have to meet the same qualifications as one who has Civil Service status? Are the same requirements necessary? If you don't know simply state.

A Yes. I am not clear on that.

Q Your present position of computer technician, how long have you been in that position?

[14] A I believe since February of '72.

Q Was this particular application for this new job the first attempt that you had made to be promoted from that position?

A Yes.

Q So you had made no other attempts prior to this time?

A No.

MR. SHERMAN: I have no further questions, Your Honor.

MR. KULIKOWSKI: Nothing further.

THE COURT: You may be excused.

MR. KULIKOWSKI: The Plaintiff at this time would like to call Mr. Anthony Franco to the stand.

ANTHONY FRANCO

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please, to the Court?

A Anthony Franco.

Q By whom are you employed and where do you work?

A Indian Affairs Data Center. I am a computer operator.

Q Are you also an EEO counselor, Equal Employment Opportunity counselor?

A Yes.

[15] Q What does that job entail, briefly?

A I act as a mediator between the employees and management.

Q In that capacity, did you have an opportunity to investigate a complaint from Miss Nancy Johnson?

A Yes, I did.

Q Do you recall when that was, Mr. Franco?

A Well, she came to me as soon as the Indian Preference Policy was out, June 23rd.

Q What was the nature of her complaint to you?

A She wanted to know how she would stand applying for this Systems Analyst's position. She wanted to know if she would be affected by it.

Q Did you investigate that, and with whom?

A Yes, I did. I met with Mr. McMullen on the, I believe it was the same day, the 23rd.

Q Were you able to gain any answers to Miss Johnson's questions?

A Yes. He said that the POB's and the certificates would be pulled back and reissued in order that these people would have, that the individual preference policy would be applied.

Q Even before the POB's and the Preference certificates were announced?

A Yes.

Q Was that your only meeting with Mr. McMullen in regard [16] to this incident involving Mrs. Johnson?

A I met with him sometime later concerning the decision by the Manpower Board on these six positions for System Analysis.

Q What was the decision of that Manpower Board?

A They decided to go ahead and select four GS-9 Analysts and two at the trainee level, which would be the 5-7, I believe.

Q Do you know how many of those six qualified for Indian Preference, if you know?

A I don't know.

MR. KULIKOWSKI: I have no further questions of this witness, Your Honor.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q I am not sure what six positions you are talking about. Were these six positions that Promotional Opportunity Bulletins had been issued prior to the effective date of the new Indian Preference Policy?

A Right.

Q On or about the day that the policy went into effect, as I understand it, you met with Mr. Carl McMullen, who is a personnel officer?

A Yes.

Q And he indicated that these would be pulled back, is that [17] correct?

A Right.

Q Now,—

A This was on the day of the Indian Preference Policy, when it was issued.

Q When it was issued?

A Right.

Q Something happened after this, something with reference to a Manpower Board?

A Yes. They had received a TWIX from Washington saying that positions that they had sent for Manpower Board's approval would be at the four positions for the 9 level and two positions for the 5/7 level.

Q Were these filled in accordance with a new policy, or not?

A Well, yes, they were.

Q They were?

A Yes.

Q But you don't know whether or not all were filled by Indian candidates?

A I believe they were.

Q They were?

A Yes.

Q What is your GS level, Mr. Franco?

A Seven.

MR. ORTEGA: That's all I have.

[18] MR. SHERMAN: No questions.

THE COURT: Do you have anything further?

MR. KULIKOWSKI: Nothing further, Your Honor.

THE COURT: You may step down, Mr. Franco.

MR. KULIKOWSKI: Plaintiffs would like to call Mr. Carl McMullen to the stand.

CARL McMULLEN

a witness, having been first duly sworn according to law, upon his oath testified as follows:-

DIRECT EXAMINATION

BY MR. KULIKOWSKI: 7

Q Would you state your name, please?

A Carl McMullen.

Q By whom are you employed?

A The Bureau of Indian Affairs.

Q What is your position with the Bureau of Indian Affairs?

A Personnel Officer and ex-chief of the Fifth Support Service Office.

Q Does your supervision of your job include personnel services to IADC?

A Yes, it does.

Q Mr. McMullen, were you present in the courtroom this morning during the testimony of Miss Johnson and Mr. Franco?

A Yes.

[19] Q Did you, in the performance of your official duties, have the opportunity to oversee the vacancies, the POB for a GS-334-9?

A May I see the exhibits? I can't remember every action that comes through my office.

Yes, sir.

Q Were certificates issued in the wake of this POB, to the best of your knowledge?

A Yes.

Q Was there a POB issued on or about May 26th, 1972?

A A POB?

Q I am sorry, a certificate.

A I don't know exactly if that's the correct date or not without having the file available.

Q Do you recall that a certificate was issued before the new policy was announced?

A Yes.

Q Do you recall if Miss Nancy Johnson's name was on that certificate?

A I could not swear for sure. She said it was, I assume that she's correct.

Q Were you instructed, in your official capacity, to implement the new Indian Preference Policy?

A Yes, sir.

Q In performance of those duties, did you have the [20] opportunity to recall the POB marked Plaintiffs' Exhibit Number 11?

A Could I have the exhibits?

Q I believe you do. The POB—

MR. ORTEGA: All the witness has before him is the one Promotional Opportunity Bulletin. I would ask that Counsel provide him with all the certificates and what we are talking about here.

THE COURT: I think Exhibit 11 was admitted this morning, was it not?

A The one I have before me, Exhibit 11, is the POB, Promotional Opportunity Bulletin. I think you are talking about a certificate which is something entirely different, and I don't have that with me.

Q Did you give instructions in the official performance of your duty to recall the POB and reissue it?

A I would have to check my files that are in the office on it. I can't remember exactly if this is the reason why I recalled it, on or about that time there was a certificate issued that was issued in error that had nothing to do with Indian Preference. It was recalled, and I think that was the case, but I am not sure. If so, that's in the deposition of the testimony that was given prior to the Hearing on the Injunction.

Q But is it—

[21] A Is this the same case we are talking about.

Q Yes, the certificate on or about the 26th of May, which we have referred to earlier.

A Yes.

Q That was recalled because of irregularities?

A Yes, sir.

Q Do you recall what type of irregularities?

A Yes, I recall that the qualification requirement of the individuals on the certificate and some had been omitted that should have been on it so it was recalled for that purpose rather than solely for Indian Preference.

Q Was the POB that you have in front of you, the Promotional Opportunity Bulletin, was that ordered recalled by yourself or anyone in your office?

A I can't answer this without consulting my record. This has been May, June, there has been so many actions gone through I can't recall it specifically. Had I known what the question was going to be, I could have prepared myself for this specific question that you are asking.

Q Mr. McMullen, after the new policy was announced, did you have opportunity to advise the executive officer at the Data Center that POB's and certificates would be recalled because of the new Indian Preference Policy?

A Yes.

Q But it's your testimony that the certificate we've [22] referred to, which Miss Johnson's name appeared thereon, is not one of those certificates?

A No, it is not, correct. It could well have been that. But in addition to Indian Preference, it was recalled for other reasons, irregularities, errors made in judging qualifications of people who had applied for the position.

Q Were these positions that were advertised, that we're discussing, were these filled subsequently?

A Some of them were, I'm not sure without consulting the records that all of them were.

Q From your recollection, do you recall if these positions were filled with any individuals qualifying for Indian Preference?

A I believe they were.

Q Do you know how many of the slots?

A I can't tell you right now.

Q By recalling the certificates, as you've testified, in conjunction with notifying the executive officer, this would

have applied to POB's and certificates issued prior to June 23rd of 1972 before the policy was announced?

A It could have.

MR. KULIKOWSKI: I have no further questions of Mr. McMullen.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mr. McMullen, let me just be clear on this, you are saying [23] that, as I take it, POB's may have been issued prior to June 23rd but no decision had been made as to persons selected to those positions by June 23rd, is that correct?

A Yes, sir.

Q So, in other words, nobody's job was taken away from them because of the Indian Preference Policy?

A No, sir.

MR. SHERMAN: No further questions.

MR. ORTEGA: I have one question, Your Honor.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. McMullen, just out of curiosity, do you qualify for the Indian Preference?

A No, sir.

MR. ORTEGA: That's all.

MR. KULIKOWSKI: I have no further questions of Mr. McMullen.

THE COURT: He may step down.

MR. KULIKOWSKI: The Plaintiffs would call Mrs. Anna Marie Dorcas to the stand.

ANNA MARIE DORCAS

a witness, having been first duly sworn according to law, upon her oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

[24] A Anna Marie Dorcas.

Q By whom are you employed, Mrs. Dorcas?

A By the Bureau of Indian Affairs, Division of Financial Management Disbursements.

Q That's located here in Albuquerque?

A Yes.

Q How long have you been with the Indian Affairs?

A Thirteen years and two months.

Q How long have you worked in the Data, Electronic Data Computing area?

A I'm sorry, I work in Disbursements, that's the vouchers section, and I have worked with them since 1964 in that particular section of the Bureau.

Q Here in Albuquerque?

A No, part of my experience was in Gallup at the Navajo Area Office.

Q Did you at any time during that six-years' experience have opportunity to serve as a voucher-examining supervisor?

A Yes, I did. In 1967 to, oh, about 1968. It might have been '69, maybe, about a year and a half.

Q Did you have opportunity to apply for a position as a voucher-examining supervisor within the past four or five months?

A Yes, it was—the announcement of who was selected was [25] made in September so it might have been August when I applied for it, August of '72.

Q Miss Dorcas, what is your present GS rating?

A I am a voucher examiner, GS-5.

Q What would have been the GS rating on the voucher-examining supervisor slot that you applied for?

A That's a GS-7.

Q Do you qualify for the Indian Preference that is the subject of this lawsuit?

A I do not.

Q Did you receive this promotion to GS-7?

A I did not.

Q Did you have any opportunity to investigate why the promotion was not received by you?

A Well, we were given the opportunity to talk to our chief as to why we did not get the job.

Q Who was that individual?

A John Arkansas.

Q What was the result of your inquiry?

A Well, I went in to see him on September 30th. I went in briefly. It was a friendly conversation and he started out with the fact, he said, "I suppose you want to talk about the 7. You realize this puts me in a very difficult position because you, of course, know about the new Indian Preference Policy—

[26] MR. SHERMAN: I am going to object to this testimony.

THE COURT: Sustained.

MR. SHERMAN: It's all hearsay.

THE COURT: The objection is sustained.

Q (By Mr. Kulikowski) Miss Dorcas, do you know whether Mr. Arkansas was the selecting officer for this position?

A Yes. We have a GS-9 position in our office and he, himself, which is filled by Bob Carswell, and Mr. Arkansas, to the other, selected the person.

Q Do you know whether your official personnel file was considered in making this promotion?

A I questioned it and I was informed that my qualifications were not reviewed.

MR. SHERMAN: I object to that.

THE COURT: What's the objection, counselor?

MR. SHERMAN: I think this is all hearsay.

THE COURT: She's testifying, I believe, counsel, as to what she knows personally. The objection is overruled.

Q (By Mr. Kulikowski) Do you know whether your experience as a voucher-examining supervisor was considered for your promotion?

A I spoke to both persons and they both informed me that my qualifications were not reviewed.

MR. KULIKOWSKI: We have no further questions at this time, Your Honor.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mrs. Dorcas, do you know the name of the person who filled the vacancy?

A There were two vacancies, one was filled by Josephine Montoya and one by Clifford Balenquah.

Q And Clifford Balenquah?

A Balenquah.

Q And both of those people qualify for the Indian Preference, do they not?

A That is correct.

Q And you do not, as I understand it?

A No, I don't.

Q Both of those people are well qualified, are they not?

A I would say yes, but unless you review my qualifications along with theirs you wouldn't know.

Q In your judgment, having worked in the same area, both of these people are well qualified, are they not?

A Right.

MR. ORTEGA: That's all I have.

MR. SHERMAN: I have no questions.

MR. KULIKOWSKI: No further questions of this witness.

I would like to call Mr. John Arkansas.

THE COURT: You may be excused.

[28]

JOHN ARKANSAS

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please, for the Court?

A John Phillip Arkansas.

Q By whom are you employed and what is your position?

A Bureau of Indian Affairs, Division of Financial Management Disbursement Section.

Q Did you hear the testimony early this morning of Mrs. Anna Marie Dorcas?

A I did.

Q Were you the selecting officer for the position that was referred to as a voucher-examining supervisor?

A I was.

Q Did you make that selection to fill that vacancy?

A Yes.

Q How many vacancies were filled?

A Two.

Q Who were the individuals that filled those vacancies?

A Josephine Montoya and Cliff Balenquah.

Q Do you know whether either of these two individuals qualify for the Indian Preference?

A They do.

[29] Q Did you have opportunity to meet with Mrs. Anna Marie Dorcas after the selections were made by yourself?

A Yes.

Q On what basis did you evaluate her qualifications for this vacancy?

A The certificates speak for themselves. All people that were certified to me for those two vacancies were qualified for the job. So, as far as selecting the two people that I did, they came from the certificate of eight people, so there were seven other Indians on that one certificate.

Q Is it a fair statement to say that you received, in essence, two certificates, one with Indian candidates and one with non-Indian candidates?

A That's right.

Q And your selections were made from the Indian candidate list, is that correct?

A Yes.

Q With regard to the non-Indian candidate list, did you consider any of the qualifications or the personnel files of those individuals in making your selections?

A No, sir.

Q Why did you not do that?

A Because I had another list with eight qualified people on it.

[30] Q Did the Indian Preference Policy play any role in this?

A Yes.

Q Mr. Arkansas, what two slots would have been filled, could you state that for us?

A Well, they were unit supervisors, they were GS-7's.

Q What is, briefly, the nature of the work involved in those two vacancies?

A Well, they supervise a unit consisting of approximately seven other voucher examiners. There was one in travel which deals with travel, and there was one in our research unit. So they were supervisory positions.

Q What is involved in voucher examining, could you briefly tell us for those of us who are laymen?

A Well, we have people who examine the voucher package that comes in to us from the various stations, the package consists of a voucher, a receiving report and a code sheet which contains the accounting information.

Q Are you familiar with the work being performed by these individuals that would have filled these vacancies?

A Yes.

Q How long have you been working with the B.I.A. in this area of voucher examining or supervising?

A With the BIA, seventeen months.

Q And any prior experience to that?

A In vouchering?

[31] Q Yes.

A Three years with the U.S. Forest Service.

Q What is your GS rating at this time, Mr. Arkansas?

A I am a GS-12.

Q Based on your experience in voucher examining and this line of work, both in and outside the BIA, is there

any reason why an Indian individual is better qualified to perform voucher examining work as opposed to a non-Indian?

MR. ORTEGA: I object to that. That's irrelevant and has no—

THE COURT: I think it's within the issues, counselor.

A Let me see if I understand. In my opinion, is there some reason why Indians are more qualified to perform vouchering duties?

Q (By Mr. Kulikowski) Because of the racial background?

A No.

MR. KULIKOWSKI: No further questions of this witness.

MR. ORTEGA: Could I have these marked as Defendants' exhibits?

(Whereupon, Defendants' Exhibits G, H, I & J were marked for identification.)

CROSS-EXAMINATION

BY MR. VICTOR ORTEGA:

Q Mr. Arkansas, I'll show you what has been marked as [32] Defendants' Exhibits G and H. Are these two of the certificates on one of these positions that you just testified about?

A Yes.

Q And the G is the certificate with the Indian candidates?

A Yes.

Q And H is the certificate with the non-Indian candidates?

A Yes, sir.

Q From that one you selected Clifford Balenquah, is that correct?

A Yes, sir.

Q I'll show you Defendants' Exhibits I and J; are these the other two certificates, Indian and non-Indian candidates that you just testified to?

A Yes, sir.

Q And this is your handwriting appearing on the bottom of Defendants' Exhibits G and J, is that correct?

A Yes.

Q And from J you selected, did you not, Josephine A. Montoya?

A Yes.

MR. ORTEGA: We'll offer at this time Defendants' Exhibits G, H, I and J.

MR. KULIKOWSKI: The Plaintiffs have no objection.

THE COURT: They will be admitted.

(Whereupon, Defendants' Exhibits G, H, I and J were offered and admitted in evidence.)

[33] MR. ORTEGA: One other question.

Q (By Mr. Ortega) On the certificates themselves, in each case they contain wording, do they not have "Best Qualified" in each case, is that correct?

A Yes, they do.

Q And this is true as to both the Indian and the non-Indian candidates?

A Yes.

Q Mr. Arkansas, how long have you worked for the United States government?

A Over ten years. Ten years, six months, approximately.

Q Are you in the Excepted Service?

A I am not.

Q Civil Service?

A Competitive.

Q Competitive. Originally, where are you from, what part of the country?

A North Carolina.

MR. ORTEGA: Thank you.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mr. Arkansas, on the certificate dealing with these two positions, I presume every Indian applicant who is

listed for those positions on the certificate was categorized as, quote, "Best Qualified," is that correct?

[34] A Yes.

Q So no Indian applicants' names appear who was, quote, "Best Qualified"?

A That's right.

Q Would the Indian Preference Policy apply in any case, assuming there were no qualified Indian applicants? Would you implement the Indian Preference Policy if the Indian applicant was not qualified?

A No, I couldn't.

Q The applicant must be qualified?

A Right. Must appear on the certificate.

Q In these two particular positions that you are discussing, were there certain supervisory responsibilities that went with the position?

A There were.

Q Can you tell us what kind of supervisory responsibilities these were? Did this involve the supervision of other employees?

A Yes, these are unit supervisors. There are six units within the office and these are two of them.

Q Generally what grade levels are involved in supervising other employees?

A Well, in this particular instance, GS-7's, but supervisors can be lower or higher grades.

Q But these particular positions involved the supervision [35] of other GS-7 employees?

A No. They involved the supervision of GS-5 employees and GS-6 employees.

Q Are most GS-5 and GS-6 employees at this office Indian or non-Indian?

A A majority are Indian.

MR. SHERMAN: I have no further questions.

MR. KULIKOWSKI: I have just a few, if the Court please.

REDIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Mr. Arkansas, do you qualify, yourself, for the Indian Preference?

A I do.

Q In making your selections off of the certifications of Indian candidates, did you consider their experience and their personnel files?

A The Indian candidates?

Q Yes, sir.

A Yes, sir.

Q But you did not consider the personnel files or the experience of the non-Indian candidates?

A No.

Q Did you interview any of the candidates involved?

A No.

[36] Q So it is safe to say that as long as there were qualified Indians on the Indian candidate list, your selection was made from that without giving any consideration to the non-Indian candidates?

A Yes.

MR. KULIKOWSKI: No further questions.

THE COURT: Anything further? Thank you, Mr. Arkansas.

MR. KULIKOWSKI: May the Court please, in the order of saving time, perhaps we could have some of the witnesses that have already testified be excused by the Court unless there are any objections.

MR. ORTEGA: We have no objection. We would like Mr. McMullen to remain from our standpoint, but no objection as to the others.

THE COURT: I don't understand.

MR. ORTEGA: Your Honor, Mr. McMullen was asked to be in Court at our request.

THE COURT: You have no objection to excusing the witnesses who have already testified, is that correct?

MR. ORTEGA: That's correct.

THE COURT: Do you, Mr. Sherman?

MR. SHERMAN: No, we have no objection.

THE COURT: They may be excused.

MR. KULIKOWSKI: I would like to call Mr. Ray Brown [37] to the stand if he is present.

RAY BROWN

a witness, having been first duly sworn according to law upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

A Ray Brown.

Q By whom are you employed and what is your position?

A The Bureau of Indian Affairs at the Southwestern Indian Polytechnic Institute.

Q What is your job out there at the Institute?

A My official position description is Educational Specialist, Reading Laboratory, GS-9.

Q Did you, within the past year to year and a half, apply for a position entitled Education Specialist IMC, GS-11 grade?

A Yes, I did.

Q What was the result of that application?

A On September 23rd, 1971, I was informed by my supervisor, Mr. Jim Felts, who is Director of the Instructional Material Center, that I had been selected for this position and I started working in this position at that time.

Q To your knowledge, does that position require approval [38] of the School Board out at SIPI?

A Yes, it does.

Q What is the composition of this School Board?

A It's an all Indian School Board.

Q It is part of their official duties to approve vacancies and promotions that are filled out at SIPI?

A Yes.

Q Was yours so considered by the Board?

A Yes, it was.

Q Did your filling that vacancy meet with their approval?

A Yes, it did.

Q In September of '71 you commenced serving in this capacity as an Education Specialist IMC GS-11?

A Yes, I did.

Q How long did you serve in that capacity?

A Until June of 1972.

Q Are you still, at this time, serving in that capacity?

A No, I am not.

Q Would you relate the incident or how it came about that you were no longer serving in that capacity as a GS-11?

A After I had been informed by my supervisor, and about six weeks after I had been informed that I had been selected for this position and was already in the position, serving in the position, I inquired as to why I had not received notification of personnel action and I was told [39] that there was a freeze and it was being held up because of this, because of the freeze, and then in June, after the Indian Preference Policy came out in June, then Mr. Jack Anderson, who is Assistant Superintendent for Instruction in SIPI, informed me that some time back that the position had actually been abolished and that with the implementation of the Indian Preference Policy, that there was no longer any hope of this position.

Q Did you receive any notification to that effect in the form of a letter or document, or anything of this nature?

A No, not officially.

Q Let me show you something marked Plaintiffs' Exhibit Number 17 and ask you if you recognize that, Mr. Brown.

A Yes, I do.

Q What role does that particular document play in the occurrences that you have just testified to?

A This was a memo from Mr. Jack Anderson, Assistant Superintendent for Instruction, designating me as officially acting coordinator of IMC in the GS-11 position.

Q To your knowledge, will this job be reopened and readvertised?

A I don't know. I have no way of knowing.

MR. KULIKOWSKI: We would move at this time, Your Honor, the admission of Plaintiffs' Exhibit 17.

(Whereupon, Plaintiffs' Exhibit No. 17 was offered in evidence.)

[40] **MR. ORTEGA:** No objection, Your Honor.

MR. SHERMAN: No objection.

THE COURT: It will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 17 was admitted in evidence.)

Q (By Mr. Kulikowski) Mr. Brown, do you qualify for the Indian Preference?

A No, I do not.

Q How long have you been with the Indian Affairs?

A It was five years this past July.

Q What is your experience during that five-year period, what type of positions have you held?

A I was a teacher in the Eastern Navajo Agency in Crownpoint, New Mexico. I served as Coordinator of the Title One Remedial Reading Program for one year and a half before coming to SIPI.

Q What is the nature of your duties out at SIPI at this time?

A My position description is presently being rewritten. It is not complete yet. But I am acting as Supervisor of the Media Section at the present time.

Q What is the GS rating at that position?

A GS-9.

Q And you have never received the promotion to the GS-11 that you have testified to?

A No, I did not.

[41] **MR. KULIKOWSKI:** No further questions.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. Brown, what is your educational background?

A I'm a graduate of the University of New Mexico. I have a Master's Degree from the Southwestern Baptist Theological Seminary in Fort Worth, Texas.

Q What field is your Bachelor's Degree in?

A Major in English.

Q Your Master's Degree?

A Religious Education.

Q How old are you at this time?

A I'm forty-five.

Q Prior to working for the Bureau of Indian Affairs, had you had any other government experience?

A Military Service. Five, one and a half years of Military Service.

Q At the present time you are under Civil Service, is that correct?

A Yes, I am.

Q Now, in September of 1971, you indicated that you had received a position as a result of an application for a promotion, is that correct?

A Yes.

Q Now, you were only acting in that position at that time, [42] were you not?

A Well, since there was no official notification, yes, it was acting.

Q Acting. And the exhibit that we just talked about, Exhibit Number 17, indicates that on January 27th, 1972, that you were designated as acting, is that correct?

A Yes, sir.

Q And that exhibit indicates, does it not, that the reason for that was because at that time there was a wage-price-type freeze which applied to all government agencies, is that not correct?

A I was never clear as to exactly what the freeze implied or exactly what it was.

Q Do you recall in the latter part of '71, in August of 1971, the President of the United States imposing a wage-price freeze order on all agencies of the government as well as private industry?

A Yea.

Q And it is a fact, is it not, that this continued in one form or another even after the original ninety-day period, is that not correct?

A Yea.

Q And the freeze referred to there is the freeze that the President imposed, as I understand it, is that not correct?

[43] A I am not sure about that.

Q You are not sure?

A No.

Q Do you do the same work now that you did in that acting capacity or is your work different?

A It's similar, but the responsibility is not as great. I am not now supervisor over the three labs, the reading lab, there's a reading lab, language lab and the basic learning lab.

Q Is there anyone who is?

A Yes. Mr. Felts, Director of the IMV.

Q Felts?

A Mr. Jim Felts, yes.

Q And is he your immediate supervisor?

A Yes, he is.

Q Is he an Indian?

A No, he is not.

MR. ORTEGA: That's all I have.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mr. Brown, are you stating in your testimony that this particular job that you sought was abolished because of the Indian Preference Policy?

A I wouldn't be qualified to answer that.

Q You were led to believe that?

[44] A No, I was not. I don't know why it was abolished, I don't have that information.

Q But, as I understood your testimony relating to this Indian Preference Policy, because there were no qualified Indian applications for that position or applicants that met the qualifications for that position, that you were not put into that position, is that your testimony?

A No, that is not.

Q Well, can you relate to me again in what way your application for this particular position relates to the Indian Preference statutes?

A It was simply after acting in the position until the end of June of 1972 of this year, that I was informed, I did not know until that time that sometime previously the position had been abolished, and that with the implementation of the new policy, that this position no longer existed, and I am not sure if it will be reopened. I doubt if it will.

Q But to the best of your knowledge, what was the reason for eliminating this position, because of the Indian Preference Policy? Was there any reason whatsoever for eliminating or abolishing this position because of the Indian Preference Policy?

A I don't think I'm qualified to answer that. I think that would be a question that the Area Personnel Office would [45] have to answer.

Q So, to the best of your knowledge, the termination or elimination of this position does not have any relation to the Indian Preference Policy?

A I'm not sure.

MR. SHERMAN: I have no further questions.

MR. KULIKOWSKI: None, Your Honor, of this witness.

THE COURT: Thank you, you may step down, Mr. Brown.

MR. KULIKOWSKI: I would like to call at this time Mr. Clyde McFalla.

THE COURT: How many more witnesses do you have, counsel?

MR. KULIKOWSKI: Mr. McFalls is the last incident we refer to. We would like to call Mr. McFalls and Mr. Jack Anderson and Mr. Mannie Foster. I would think we could dispose of that in twenty-five minutes.

THE COURT: How many more do you have?

MR. KULIKOWSKI: Those. Mr. McFalls and two others, and then we would like to call one adverse witness that the government has brought out from Washington.

CLYDE McFALLS

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please, for the Court?
[46] **A** Clyde McFalls.

Q By whom are you employed and in what capacity?

A B.I.A., Southwestern Indian Polytechnic Institute, Audio Visuals Production Specialist, GS-7.

Q How old are you, Mr. McFalls?

A Fifty.

Q How long have you been employed by the Federal Government?

A Including two years and eight months Military, about nine years and eight months, something like that.

Q How long have you had work experience in the audio visual area?

A In the audio visual area, this includes all graphics-type work, I assume, doesn't it?

Q Yes, if that's involved.

A Twenty-five years, and thirteen years has been as a first line supervisor.

Q How long have you been employed by the B.I.A. out at the Institute?

A One year, two months.

Q What was your job position prior to that time?

A I was a jump out just prior to the phaseout at Sandia Base in 1968 as a GS-11, and transferred to the Pentagon at the same rate. I stayed there two and a half years at the Pentagon prior to coming to SIPI. I had to resign in order to get back to Albuquerque.

[47] Q What was your title there in Washington?

A Visual Information Specialist Presentation.

Q It was GS-9?

A It was a GS-11.

Q When you returned to Albuquerque and went to work for the Southwestern Indian Polytechnic Institute, what was your GS rating when you started there?

A GS-7.

Q So you went from a GS-11 down to a GS-7?

A I had already resigned my 11 position. This was a reinstatement as a GS-7.

Q Why did you return to Albuquerque, what were the reasons for that?

A My home was here and I just wanted to move back to Albuquerque.

Q Do you qualify for the Indian Preference we are concerned with in this action?

A No, I don't.

Q Mr. McFalls, within the past four or five months did you have opportunity to apply for a position as a Visual Information Specialist, a GS-9, out at SIPI?

A Yes, I did.

Q I hand you something marked Plaintiffs' Exhibit Number 13 and ask you if you recognize that.

A Yes, I do.

[48] Q Is that the POB for which you applied for the position out at SIPI?

A It is.

Q Did you receive that promotion?

A I did not.

Q Did your name appear on a certificate after your application was submitted?

A I was told it wasn't on the first certificate.

Q Did you take any action when learning of this?

A I did talk to our own personnel officers and the EEO officer, Mr. John McConley and, of course, at the time there was very little had come up about the Indian Preference Policy.

Q Was this prior to the announcement of the policy by the way, that you applied?

A Yes, it was prior to the policy, yes.

Q I am sorry, I think I cut you off.

A Well, I did call Mrs. May Hall and inquire why I wasn't put on the certificate, why my name wasn't on the certificate, and she said that as long as one Indian had applied for the position, a non-Indian doesn't have to be considered. I asked her if I have been qualified. She said I was Highly Qualified but due to the Indian Preference Policy, I was not considered.

Q Mr. McFalls, I hand you something marked Plaintiff's [49] Exhibit 16 and ask you if you recognize that?

A Yes, I do.

Q And would you tell the Court in your own words what that particular document is?

A Well, this is the statement in response to my call to May Hall, and it says that "To comply with the Commissioner's new Indian Preference policy, the Indian applicant was the only applicant certified for consideration."

Q So your name did not even appear on the first certification?

A Did not appear on the first certificate, no, sir.

Q And this was because you did not qualify to the Indian Preference?

A Yes.

Q Did you take any action at that time to try and remedy this situation?

A No, other than talking to the EEO officer and our own personnel officer, and this one question that I made for the statement.

Q Do you know whether any subsequent certifications were issued for this particular position, to the best of your knowledge?

A No. Not to the best of my knowledge.

Q Did you receive the promotion that you applied for in the POB?

[50] A No, I didn't.

MR. KULIKOWSKI: Your Honor, we would move the admission of the two exhibits, Plaintiffs' Exhibit 13 and Plaintiffs' Exhibit Number 16.

(Whereupon, Plaintiffs' Exhibits Nos. 13 and 16 were offered in evidence.)

MR. ORTEGA: We have no objection to either one of these exhibits. We would point out that Plaintiffs' Exhibit 16 is already in evidence. I believe that's a duplication of a letter marked Plaintiffs' Exhibit Number 9.

MR. KULIKOWSKI: I am sorry, that's correct, Your Honor. We will withdraw 16 in view of 9 already having been admitted.

THE COURT: Mr. Sherman, do you have any objection?

MR. SHERMAN: No objection.

THE COURT: It will be admitted, Number 13 will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 13 was admitted in evidence.)

Q (By Mr. Kulikowski) Mr. McFalls, what is your present GS rating out at SIPI at this time, is it still a 7?

A GS-7, yes.

MR. KULIKOWSKI: No further questions.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. McFalls, as I understand it, you have approximately [51] nine years of government service?

A Approximate, yes.

Q And some of that was in the military?

A I have almost ten years of service, including two years and eight months military.

Q And prior to your government service, which appears to be the most recent,—

A Yes.

Q —where were you employed?

A With Hays International Corporation. It was a division out of Huntsville, Alabama, it was a technical manual publication division.

Q Were you doing similar work with that company?

A Yes, I was production supervisor over thirteen personnel, which included photographer, typing, illustrating, layout.

Q In your GS-7 position at the Southwestern Indian Polytechnic Institute here, you are under Civil Service, is that not correct?

A Yes.

Q As a practical matter, no one was ever selected for the Visual Information Specialist, GS-9 position that you testified to, is that correct?

A No, sir. Correct.

Q And the reason for that given by the Southwestern Indian Polytechnic Institute was that after evaluation of the [52] staffing pattern and the availability of funds, it was their decision simply not to fill that position, is that correct?

A This is my understanding, yea.

MR. ORTEGA: That's all I have.

MR. SHERMAN: No questions.

MR. KULIKOWSKI: No further questions.

THE COURT: That's all, Mr. McFalls. Thank you.

MR. KULIKOWSKI: At this time we would like to call Mr. Mannie Foster to the stand.

H. MANNIE FOSTER

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Will you state your name, please, for the Court?

A H. Mannie Foster.

Q By whom are you employed and what is your position?

A Albuquerque Area, Bureau of Indian Affairs.

Q Your position?

A Acting Indian Personnel Officer.

Q What is your area of supervision as far as personnel for the area is concerned?

A Perform the services of the personnel management activities for the Albuquerque area, which includes the [53] State of New Mexico and the Indian Reservations within that which pertains to personnel.

Q Does this also include the Southwestern Indian Polytechnic Institute?

A Yes.

Q Were you present in the courtroom earlier this morning when Mr. McFalls testified in regards to a promotion he applied for at the Institute?

A Yes.

Q Mr. Foster, I hand you something marked Plaintiffs' Exhibit Number 14 and ask you if you recognize that.

A I recognize it as a document. It was issued by the Albuquerque Area Office, signed off by one of the employees of the Southwestern Indian Polytechnic Institute.

Q Does your office out at the area have the responsibility of preparing certifications?

A Right.

Q Is this document I have handed you one of those certificates, so prepared?

A It is such.

Q Does that indicate that this was for the same position that we have discussed earlier this morning arising out of the testimony of Mr. McFalls?

A This indicates it's for the Visual Information Specialist, [54] yes.

Q Do you know whether the named individual on that exhibit qualifies to Indian Preference?

A It is stated on here that he does qualify as an Indian Preference.

Q What is his name?

A It appears to be David Clark.

Q Was a personnel action taken on the basis of this certificate, to the best of your knowledge?

A I don't know. I am not aware of it, anyway.

Q Mr. Foster, I hand you something marked Plaintiffs' Exhibit Number 9 and ask you if you recognize that document.

A This is a letter addressed to Mr. McFalls and signed off on by me, dated July 13th, 1972.

Q Do you recall that communication to Mr. McFalls?

A As of now I don't recall it, but certainly is authentic because I signed off on it.

Q What prompted your letter marked Exhibit 9 to Mr. McFalls?

A I had a request from him, says "Your request for a written statement" as to why he was not on the certificate for this Visual Information Specialist that we referred to over here just a moment ago, and we wrote him this letter indicating to him that "because of the qualified Indian applicant that was certified."

[55] Q And there was no reason for him to have his name appear on the certificate because another certificate with a qualified Indian had been issued?

A Right.

Q Is that other exhibit in front of you marked?

A 14, I believe.

Q That Indian on that certificate?

A It is.

Q I hand you something marked Plaintiffs' Exhibit Number 15, please note it's in two pages, and ask you if you recognize that particular document.

A These are two merit promotion plans certificates issued by our office.

Q Is this for the same position that Mr. McFalls had applied for and for which the other certificate Number 13, 14, I am sorry, is before you? Are those for the same positions?

A Right.

Q Why would it occur, sir, do you remember that a second certificate, namely 16, I believe it is, was reissued?

A No. I am not aware of the details of this particular transaction, although I think perhaps there might be testimony in the file by Mrs. Hall, who testified last week.

Q Just state what you know, if you would, Mr. Foster.

[56] A Well, I don't know.

Q Do you know whether a promotion was ever made in regard to this slot, this vacancy that these two certificates pertain to?

A I think not.

Q Who would decide, Mr. Foster, whether that position was filled or not? Would there be a selecting officer on that?

A Yes.

Q Who would that selecting officer have been in this case?

A The supervisor of this particular job, and I believe, well, I'm not familiar enough with the organization out there.

Q To the best of your memory, would that have been Mr. Jack Anderson?

A Could have been. He certainly could have been in on this selection process, yes.

MR. KULIKOWSKI: Your Honor, we would move the admission of Exhibits 14 and 15, 9 being already in.

MR. ORTEGA: No objection from the government, Your Honor.

MR. SHERMAN: We have no objection.

THE COURT: The exhibits will be admitted.

(Whereupon, Plaintiffs' Exhibits 14 and 15 were offered and admitted in evidence.)

[57] MR. KULIKOWSKI: We have no other questions of Mr. Foster.

(Whereupon, Defendants' Exhibits K and L were marked for identification.)

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. Foster, showing you what has been marked for identification prior to this as Plaintiffs' Exhibit 15, which was just shown to you, this consists, does it not, of two certificates, one Indian and one non-Indian, is that correct?

A That's correct.

Q I'll show you what has been marked for identification as Defendants' Exhibit Number L. Was that memorandum originally from your office?

A This is correct.

Q And it refers to Marie Adronicus, who also appears on Plaintiffs' Exhibit 15 as a non-Indian candidate, is that correct?

A Right.

Q Now, Mrs. Adronicus had, it is indicated on there, priority consideration over Mr. McFalls for the selection to this particular job, is that correct?

A Yes, sir.

Q Why was that, according to those documents?

[58] A I'm not familiar with the citation that we have cited, but I think this was because he was already an employee of the Bureau of Indian Affairs.

Q She was a non-Indian employee?

A Right.

Q I will show you Defendants' Exhibit K and I'll ask you if this refers to the same series of transactions, the Visual Informational Specialist out at SIPI?

A Your question is what, again?

Q Does this refer to the Visual Informational Specialist we are talking about?

A Correct.

MR. ORTEGA: At this time we'll offer Defendants' Exhibits K and L.

MR. KULIKOWSKI: No objections by the Plaintiffs.

THE COURT: They will be admitted.

(Whereupon, Defendants' Exhibits K and L were offered and admitted in evidence.)

Q (By Mr. Ortega) Now, referring you to Defendants' Exhibit K, this is the memorandum to your office to one of your employees, May S. Hall, is that correct?

A That's right.

Q And from the Southwestern Indian Polytechnic Institute?

A Right.

Q Indicating that they had decided to not fill the Audio [59] Visual Information Specialist?

A That's right.

Q What reasons do they give in that memorandum?

A "Upon receipt of the Certificate of Eligibles by the Albuquerque Personnel Office, management at the Institute made a decision after evaluation of the staffing pattern in the Instructional Material Center and availability of funds . . .", made them determine that they will not file this position. This is dated November 1, 1972.

MR. ORTEGA: We have no further questions of this witness.

MR. SHERMAN: No questions.

MR. KULIKOWSKI: No questions.

THE COURT: You may step down, Mr. Foster.
We will take a short recess.

(Whereupon, the Court stood in recess at 10:33 A.M.)

(Whereupon, Court was resumed at 11:43 A.M.)

MR. KULIKOWSKI: We would like to call Mr. Jack Anderson to the stand.

JACK R. ANDERSON

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

[60] A Jack R. Anderson.

Q By whom are you employed?

A By the Bureau of Indian Affairs at the Southwestern Indian Polytechnic Institute.

Q What is your job at the Institute?

A I am the Assistant Superintendent in charge of the Instructional Division.

Q Does a Mr. Ray Brown come under your supervision?

A Not—I am not his first line supervisor, no.

Q Would it be second line, fair to say that you are the second line supervisor?

A Yes.

Q Were you present when Mr. Brown testified earlier this morning as to the promotion or temporary promotion he received out at the Institute?

A Yes, sir.

Q Do you recall that the position that Mr. Brown had applied for was abolished in June of 1972?

A Yes.

Q Do you recall informing Mr. Brown of that job being abolished?

A Yes.

Q Do you recall if that was before or after the Indian Preference went into effect?

A I don't recall exactly.

[61] Q Do you recall the reason you stated for the job being abolished?

A The reason that I gave Mr. Brown is the fact that the President's Directive at that time put a freeze on additional, in regards to our situation, additional new job promotions into another area.

Q At that time did you tell Mr. Brown that if the job was reopened, that it would come under Indian Preference?

A I don't recall that, no.

Q Mr. Anderson, I hand you something marked Plaintiffs' Exhibit 17 and ask you if you recognize that.

A And your question, sir?

Q Do you recognize that?

A Yes, it was signed off by me.

Q Is it correct to say that that was the notification to Mr. Brown that he had been assigned to that acting position out at SIPI?

A Acting Education Specialist, yes.

Q Do you recall when Mr. Brown was selected for that position?

A To the best of my knowledge, it was in the summer.

Q Of the year before?

A No, not in '71. Let's clarify the position.

Q The acting position of an Educational Specialist, IMC, a GS-11.

A That was in '72.

[62] Q You do not recall him filling that capacity initially in September of 1971?

A In 1971 Mr. Brown was hired as an Education Specialist, and that is the job that they're referring to here.

Q That would be the Education Specialist, IMC, a GS-11 slot?

A I don't believe so.

Q Do you recall Mr. Brown going before the School Board out at SIPI in relation to this vacancy that's involved here?

A We had presented and recommended Mr. Brown for this position before the School Board, yes.

Q Do you know if the School Board acted on that recommendation?

A At that time they agreed with our recommendation.

Q Which was what?

A That Mr. Brown be the person selected.

Q For this GS-11 position?

A Right.

Q Do you recall when that was when the Board met and the recommendation was accepted?

A No, sir. I don't recall the exact date.

Q Could it have been September of 1971, to the best of your recollection?

A I don't believe so.

[63] Q When you notified Mr. Brown that the job had been abolished, I believe it's your testimony you don't recall when that was, is that correct?

A I can't give you the exact date, no, sir.

Q Do you remember the month?

A No, sir, I don't have my records in front of me. I would hesitate to guess.

Q Is it possible that it was after the Indian Preference went into effect?

MR. ORTEGA: I'm going to object, Your Honor, he's trying very hard.

THE COURT: Yes, sustained, counsel. He has said that he doesn't remember.

Q (By Mr. Kulikowski) Mr. Anderson, were you present this morning when Mr. Clyde McFalls testified in this cause?

A Yes.

MR. ORTEGA: We are going to object at this time about the testimony of Mr. McFalls. It was gone into on the Preliminary Injunction Hearing. Anything on that that you would go into would be repetitive.

THE COURT: We can't tell what the question is going to be. A great deal of this is cumulative.

MR. KULIKOWSKI: Mr. McFalls was not present at the Preliminary Injunction Hearing. That is part of the [64] reason we called Mr. Anderson at this time.

THE COURT: Go ahead, ask your question.

Q (By Mr. Kulikowski) Mr. Anderson, do you recall Mr. McFalls applying for the job that he testified to earlier this morning?

A Yes.

Q Would you have been the selecting officer to fill that vacancy?

A I would have been one of either two or three.

Q Who would the other individuals that were involved in the selection, who would they be?

A The Superintendent, and the Assistant Superintendent for Administration.

MR. ORTEGA: We are going to object now. This is going into exactly what we went into at the Preliminary Injunction.

THE COURT: Yes, that's correct. And you have also gone into it this morning.

MR. KULIKOWSKI: There was one matter that was not discussed at the Preliminary Hearing. It bears on the important aspect of the Indian Preference. The exceptions been made—

THE COURT: Why don't you get to that particular point? It has already been established that this position was not filled by anybody.

[65] MR. KULIKOWSKI: We feel that the reasons why it was not filled goes off—

THE COURT: Get directly to the point, if you would, counselor.

MR. KULIKOWSKI: I'll try my best to do that, Your Honor.

Q (By Mr. Kulikowski) Mr. Anderson, is it not a fact that having a voice as a selecting officer, that it was your opinion in that capacity that you abolished or had this job abolished rather than give it to someone who you felt was not qualified or give it to Mr. McFalls because that would have required special permission being obtained from Washington?

MR. ORTEGA: That's leading.

THE COURT: That's not a pertinent question, counselor. Objection sustained.

Q (By Mr. Kulikowski) Mr. Anderson, in your opinion as a selecting officer, was Mr. McFalls qualified for the job that he applied for?

A In my opinion he would have been.

Q Would you categorize his qualifications as extremely highly qualified?

MR. ORTEGA: We went into this the last time and this we find objectionable. We object.

THE COURT: Yes, counsel. Mr. McFalls was not [66] certified anyway, so this witness had no opportunity to consider his qualification. Objection sustained.

MR. KULIKOWSKI: Plaintiffs' Exhibit 15 show that he was certified.

THE COURT: I am sorry about that.

Q (By Mr. Kulikowski) I'll show you Plaintiffs' Exhibit 15, Mr. Anderson, and ask you to recognize that.

THE COURT: The subject has been covered already by your counselor. You can ask your question about this exhibit if you like.

Q (By Mr. Kulikowski) Do you recognize that certificate?

A Yes.

Q Does Mr. McFalls' name appear on that certificate?

A No.

Q Would you refer to page two of the certificate?

A Yes, it appears on page two.

Q Did you consider these certificates?

A Yes.

Q Is your role as a selecting officer?

A I am one of a team that considered them, yes.

MR. KULIKOWSKI: We have no further questions, Your Honor.

MR. ORTEGA: We have no questions of this witness, Your Honor.

MR. SHERMAN: No questions.

[67] **THE COURT:** You may be excused, Mr. Anderson.

MR. ORTEGA: May Mr. Anderson be permanently excused?

THE COURT: Yes.

MR. KULIKOWSKI: Your Honor, at this time we would like to call Mr. Gunter and we would like to ask that he be declared, for purposes of our examination, an adverse witness. Mr. Gunter is the Chief Personnel Officer out of the B.I.A. in Washington.

RAYMOND GUNTER

a witness, having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Would you state your name, please?

A Raymond Walter Gunter.

Q What is your position?

A I am the Personnel Officer for the Bureau of Indian Affairs located in Washington, D. C.

Q Who is your direct supervisor?

A Carl Cornelius, Director of the Administrative Services.

Q Who would be his immediate supervisor, would he report directly to the Commissioner?

A His immediate supervisor is the Deputy Supervisor, John Crow.

[68] Q Is it fair to say that you are the head personnel executive for the Bureau of Indian Affairs?

A That is correct.

Q How long have you served in that capacity?

A Since July of 1967. Approximately five and a half years.

Q You are then, I take it, familiar with the Indian Preference Policy which is the subject of this present cause, is that correct?

A Yes.

Q In your opinion, and based on your job and your experience in that job, is the policy, as stated and announced on June 23rd, being fully implemented at this time?

A That's a little hard to answer because the implementing procedures, that is, the revisions to the promotion program in final form have not been issued to the field. Now, the reason for this is that any revisions to

a promotion program require the approval of the Office of the Secretary. Those revisions were sent to the Office of the Secretary several months ago; approximately three weeks ago we got back the approval to go ahead with the revisions.

However, because of incidents in Washington, we have not yet been able to prepare that release and get it to the field, so in the meantime, the field is operating [69] with interim procedures.

Q It was your understanding that the policy, when announced, would be put into immediate effect, is that correct?

A It would be put into immediate effect, yes.

Q To the best of your knowledge, that has been done with the qualification that there are interim regulations in effect?

A To the best of my knowledge, yes.

Q Mr. Gunter, did you participate in the formulation and the establishment of this policy before it was announced?

A Yes, I did.

Q What was your role, or what function did you perform in the implementation and the formulation of the policy?

A Well, it was the responsibility of my office to do the staff work in the Bureau to provide the various alternatives, and the information was pertinent to deciding whether the Indian Preference Policy should be changed.

Q Changed from what to what?

A Changed to what it had been up until that point, and that is the application of the preference at the initial appointment.

Q And what were some of those factors, based on your having gone through that experience?

A I'm sorry, I don't understand the question.

[70] Q I believe you testified just a minute ago that you considered these alternatives, and I believe you used the word "factors" that went into whether the policy

would be changed, and I wonder if you would relate for the Court what those alternatives were.

A What I intended to say was that we had prepared several different ways in which the Preference Policy could be applied, all the way from what was currently into effect to complete preference in all respects, and several intervening stages.

Now, the purpose of this was to provide the Commissioner, and ultimately the Secretary, the various pertinent bits of information in making such a decision.

Q Do you know why the policy came up for review? Were you ever informed as to—

A Yes. If I might go back a bit. The policy has been reviewed three times, commencing in 1966. The first time was, this was before my being placed in the position in Washington, it was in the spring, I believe, of 1966. The Bureau made a thorough review of the policy at that time and issued the policy that was in effect up until July 23rd of this year. That policy being that Indian people, qualified Indian people would have preference on initial appointment and provide the implementing procedures for doing this.

[71] Prior to that time it had been a policy but had not been consistently applied throughout the Bureau.

Then in 1970, approximately March of 1970, when the new Commissioner, Bruce, was on the job, we made another review and I participated in that particular review. At that time the Commissioner and the Secretary's Office, the Assistant Secretary's Office decided to continue the policy as it was currently in effect but to add to it some other features.

Let me explain this for just a minute. We presented three alternatives to them, one was to continue the policy as it had been; two was to extend the Preference into promotions and training; and the third alternative was to continue the existing policy but to accelerate and make a much more comprehensive effort in recruitment to develop new training programs that would assist people in developing skills much more rapidly for advancement.

The third alternative at that time was taken and was put into effect.

Q And the present policy is this third alternative?

A No, it is not. Let me explain what the alternative was that was placed into effect. It did not really change the Preference Policy as such but it did add a much more comprehensive training effort, development effort, with particular emphasis to development needs of Indian people, [72] and it did include a much more comprehensive recruitment effort, particularly at seating Indian people who could qualify for what we called the entrance time positions for administrative technical or administrative positions. It is from these levels that these people are moved up to higher-grade management position. That alternative was put into effect at that time.

Then approximately March or April of 1971, the policy was reviewed again, or at least the review commenced in September. The Bureau developed a proposal and submitted it to the Department following several months of consultation with the Civil Service Commission within the Department with the Indian Health Service, HEW, which has a similar policy deriving from the 1934 Act.

The Secretary did decide to put that policy into effect, and that's the policy that was announced by wire to the field on June 23rd, I believe, of this year.

Q Were you in on the first review back in 1966?

A No, I was not.

Q In the second review in 1970, was it considered that the policy would be expanded to include promotion and training?

A This was one of the alternatives considered but it was decided at that time not to do that.

[73] Q Do you know what the reasons were for that decision?

A No. I can only speculate, I did not make the decision, but it's a combination of things. It's my understanding, I would like to state this as far as the Preference Policy itself, and you can see this by reading the Hearing, particularly the 1934 Act, that the intent of the Preference Policy is that the Indian Service be staffed

with an Indian staff in total. This seems to be the intent of the statute. I'm referring to the 1934 Act.

Our concern has been to increase the involvement of Indian people at all levels in the Bureau but we have attempted to try to do it, recognizing that we have a large staff consisting of people from many ethnic backgrounds. Up until this year we had attempted to, other methods to accelerate the advancement of Indian people. We were not satisfied that the progress was being made that both the Commissioner and Secretary felt was necessary in order to greatly increase the number of Indian people in all levels.

Q You say that you considered or you referred to the 1934 Act, what Act would that be?

A It would be the Wheeler-Howard Act, June of 1934. It's the Indian Reorganization Act.

Q It goes by both of those names, the Indian Reorganization [74] and the Wheeler-Howard Act, is that correct?

A That's my understanding.

Q And is it correct that what is now Section 472 of Title 25, U.S. Code 1 of the Section out of that Act that was relied on in formulating the policy?

A This is the section that contains the Indian Preference statement, that's correct.

Q Were there other sections out of the Code that were relied on in formulating the policy?

A Out of the Code, yes. There are several earlier Indian Preference statutes going all the way back to 1934, I believe. There are three or four sections, I am not sure of the exact number, 40, 45 in the Code, which are the earlier statutes that refer to Indian Preference.

Q Now, the new Indian Preference refers to those being qualified for the Preference being one-quarter Indian blood or more, is that correct?

A That's correct, one-quarter degree of Indian blood of a federally-recognized tribe.

Q What was the reason that that particular fraction was used in formulating the policy?

A Well, it stems from a 1938 executive order. This is the authority that the Bureau has used for the quarter degree.

Q Is there, to your knowledge, and based on your formulation or hand and formulation, is there anything in the Indian [75] Reorganization Act dealing with the degree of blood necessary for Indian Preference?

A Yes, there are provisions in the Indian Reorganization Act. I'm not at this point, I couldn't tell you, I am not that familiar with those provisions.

Q In formulating the policy, was it ever raised that the fraction contained in the Indian Reorganization Act would be one-half or more Indian blood?

A No, this point never came up.

Q It wasn't discussed or didn't play a role in the formulation?

MR. ORTEGA: That's misleading. We're going to object to that because I think the Indian Reorganization refers to certain qualified type of Indian only one-half of which would be one-half Indian blood.

THE COURT: I think he can clarify the question. I think the witness understands the question. I don't quite understand why this is pertinent anyway. We are confronted with the Act as it is now and that's our problem today. The background is interesting but make it as brief as you can.

MR. KULIKOWSKI: We're trying to bring it out before the formulation of the new policy so there's no doubt as to what was used.

Q (By Mr. Kulikowski) Mr. Gunter, are you aware of a policy or proposed policy within the Bureau dealing with out [76] placement of non-Indians within the B.I.A.?

A Yes, I am.

Q Is that a proposed policy or an announced one?

A It's a proposed policy. Early in the discussions as to whether the Preference should be extended into promotions and training, this type of thing was discussed and we've had many discussions, particularly with the national office, the National Federation of Federal Employees, which office made strong recommendations, both to

us and to the Department, that such a policy be developed.

We have had similar comments from their Locals of that particular unit and individuals. We also felt that we should develop such a policy and there is such a policy now in draft form that's being discussed in the Office of the Secretary.

Q What would the policy provide for in the way of out placement?

A Well, this is what we are trying now to formulate, but briefly and generally speaking, it would provide assistance to employees who wish to seek employment in other Bureaus of Interior or other federal agencies.

Q Is it felt that there will be a demand to such service within the Bureau?

A Yes. We have had requests from individuals. We have no idea how many, but have had individual requests from [77] people already.

Q Is this proposal being considered because of the Indian Preference Policy?

A Yes, it is.

Q In other words, is it anticipated at the Bureau that there will be quite a number of non-Indian employees who will be intending to leave the B.I.A.?

A No. I would not say that the policy is being developed for that purpose. We have developed it because we have had requests from employees for assistance and what we are trying to do is to respond to these requests.

Q Do you have any idea what the number of requests would be? Could you characterize for us even in a ball park figure?

A No, I couldn't at this point. But I don't believe there are a large number at this point. I can only speak from my own personal experience, and this involves, oh, probably ten or fifteen people.

Q That you have looked at—

A That have requested assistance. Let me add that this is not unusual. The Bureau of Indian Affairs, for two or three years now, has been in a state where employees have been considerably agitated for a number

of reasons. Part of the desire to leave the Bureau stems from other reasons than what you are alluding to. Also in the [78] normal course of events people ask for assistance and the Bureau has always had a policy of assisting employees in any way that it could who wanted to seek employment elsewhere. It can occur for a variety of reasons.

Q Is it a fair statement to say, though, that the Indian Preference Policy has spurred the intention to develop such a policy?

A Yes.

Q Mr. Gunter, getting back to the Indian Reorganization Act of 1934, also referred to as the Wheeler-Howard Act, are you familiar with a provision in that Act that gives the various Reservations individually the right to reject the provisions of that Indian Reorganization Act?

A Yes, I am familiar with the provision.

Q Do you know, based on your experience with BIA, that Reservations have so rejected the Act?

A I understand that a few have. I am not familiar with which tribes these are except for the largest, the Navajo Tribe.

Q So, it is your understanding, based on your official duties, that the Navajo has rejected the Indian Reorganization Act?

A That's my understanding.

Q Are there other Reservations in the United States that have [79] done so, to the best of your knowledge?

A I can't answer that question. I don't really know.

Q Mr. Gunter, is it fair to say that part of your official duties is monitoring the implementation of the Indian Preference Policy?

A Yes.

Q In performing that duty, do you monitor the personnel actions that are made under the policy?

A Well, that's difficult to answer. We have a pretty complete delegation of authority to our area offices and to our one administrative activity that serves central office positions in the field. We have only approximately nine hundred positions that are served out of the Wash-

ington office, the Washington operating office, which is under my direct supervision.

The remainder of the Bureau, in the neighborhood of some fifteen hundred thousand positions, the appointing authority, except for key positions, remains in the Washington office in this one administrative unit.

Our monitoring persists of periodic evaluations which probably would not occur more often than once every two or three years.

Q In performance of your duties and in monitoring the personnel actions that are taken, are records kept as to which vacancies are filled by Indians and non-Indians [80] at the Washington office?

A Not for all positions, no. Just those that are served out of Washington. These records that you refer to are maintained in the area personnel offices and in the one administrative office to the central office activities in the field.

Q Where would that be?

A Here in Albuquerque.

Q But this information is readily available to someone in your position in Washington, is that not correct?

A That is correct. Yes.

Q I hand you something marked Plaintiffs' Exhibit Number 10 and ask you whether you are familiar with the content of this document.

A Yes, I am. This was prepared by my staff.

Q What, in your own words, does the document reveal relative to the new Indian Preference Policy?

A Well, it's hard really to tell. Well, what is on the document is a total of promotions that took place prior to June 23rd, which is the date that the new policy went into effect, and since June 24th. The number of promotions is broken down by Indian and non-Indian.

Now, there are a couple of difficulties with the information that is here. Number one, the number of promotions which are much less from January 1 to June 23rd; [81] one of the reasons for this is that we were under rather stringent employment fund controls at that time.

Q Since the policy has gone into effect, has there been

a noted increase percentagewise of Indians that have received promotions according to the plan?

A This is correct, but you cannot tell from the figures that are contained there which of those were affected by the policy and which are people that were selected or would have been selected regardless of the policy.

Q What is the time period covered in these statistics that your office prepared?

A Well, the first period was from January 1 to June 23rd, just prior to the effective date of the new policy. The later period is from June 24th to November 15th, which is a period of time during which the policy has been in effect.

Q What do the figures show as far as the promotions made to Indians and non-Indians for the former time period, namely from January 1st to June 23rd of this year?

A Well, they show an increased percentage of Indians being promoted in relation to non-Indians, is that what you are asking?

Q Yes. And the same question for the later period, namely from June 23rd to the cutoff date.

A Well, in both periods there were more Indians promoted [82] than non-Indians. However, in the later period, that is the period since the policy has been in effect, the percentage of Indians promoted has increased over what it was in the previous period.

Q Could you state what degree of percentage or percentage increase there has been since the policy?

MR. ORTEGA: Your Honor, the figures speak for themselves.

MR. KULIKOWSKI: All right. We will move the admission of this document at this time.

(Whereupon, Plaintiffs' Exhibit No. 10 was offered in evidence.)

THE COURT: Any objection?

MR. ORTEGA: The government does not. But I would like the Court to know that the document was supplied by the government in response to a Request for

Documents submitted by Plaintiffs' counsel. Those documents could not be supplied and it wasn't any desire on our part not to comply, it was simply that the documents did not exist to furnish this kind of information. We therefore gathered the information requested and supplied it in the form of this letter and that's what this exhibit is, Your Honor.

MR. SHERMAN: We do object to the introduction of this exhibit. I don't know if the Court has had a chance to see it, but that particular exhibit, it seems to us, is [83] irrelevant. It really doesn't indicate to us whether any of those Indian employees after June 23rd have had the benefit of the Indian Preference statute.

THE COURT: Well, counsel, you can examine the witness with regard to that. The exhibit will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 10 was admitted in evidence.)

THE COURT: Are you through, Mr. Kulikowski?

MR. KULIKOWSKI: Yes, I am.

THE COURT: Go ahead, Mr. Sherman.

MR. SHERMAN: Would you prefer that I voir dire him now on the exhibit?

THE COURT: Yes, go right ahead.

VOIR DIRE EXAMINATION

BY MR. SHERMAN:

Q Referring to Exhibit 10, do you know precisely the Indians that have been promoted as a result of Indian Preference statutes since June 24th, 1972?

A No, I do not.

Q Is there any way whatsoever to tell what that number would be from looking at Plaintiffs' Exhibit 10?

A You cannot tell it from the exhibit.

Q So the exhibit in no way would indicate how the Indian Preference Policy has affected the increase of Indian promotions in the latter part of this year?

[84] A In my opinion, no.

MR. SHERMAN: No further questions.

THE COURT: Do you have something, Mr. Ortega?

MR. ORTEGA: Yes, Your Honor, we do have something.

CROSS-EXAMINATION

BY MR. ORTEGA:

Q Mr. Gunter, first of all, everyone else has been asked this question, are you entitled to the Indian Preference?

A No, I am not.

Q How long have you been in personnel work, Mr. Gunther?

A Approximately fifteen years.

Q Has this been with the United States Government?

A It's been with the United States Government, that's correct.

Q In this connection, in connection with your personnel work and in your employment with the Bureau of Indian Affairs, are you familiar with the approximate number of Indians employed in the Bureau of Indian Affairs in 1934?

A Well, the information that I have comes from documents, some of which I believe are in this case in evidence. The information I have indicates that approximately 2,100 Indians were employed in 1934 out of total employment population of about six thousand five, or roughly about thirty-four per cent.

Q At the present time in 1972 what are the percentages?

[85] A Well, the percentage as of May of this year was fifty-seven per cent of the total employment of the Bureau was Indian.

Q And the total employment is, I think you indicated in your earlier testimony, somewhere in excess of 16,000?

A Yes.

Q Approximately what is that figure at this time, the total employment?

A It is—I thought I had the figure here. But it's approximately 16,500.

Q Of that fifty-seven per cent, approximately, at this time are Indian?

A Yes. Now, I probably should add that that includes all employment, all what we call full-time employment which calls temporaries as well as permanents.

Q Are you familiar with the numbers, percentages of Indians in the various GS classifications in the Bureau at this time?

A Yes, I have made some computation on this.

Q Are these from records in the Bureau of Indian Affairs?

A Yes, sir.

Q At the present time can you tell us what the figures are with reference to GS-7 and below?

A Yes, there's a—now this is as of May of this year, there are a total of 7,527 employees GS-7 and below, of which 5,749 are Indian, which consists of seventy-six [86] per cent.

Q And in the area of GS-9 through GS-12, approximately what are the numbers of total employees and what percentage of those are Indians?

A Well, there's, for GS-9 through GS-12, a total of 5,195 employees, of which 1,180 are Indians or a total of twenty-one per cent. Roughly one in five.

Q In your experience with personnel work, from what group of GS level does the positions GS-12 and above, I talk about those as management-type positions, from what group do they come from?

A They generally come from the, what we call the middle management group. The GS-9, GS-12, predominantly.

Q In GS-12 and above, what are the percentages of Indian employees as opposed to non-Indian at this time?

A Again, as of the same date, May of this year, there were 1,684 total employees of GS-12 and above, of which twenty-one per cent were Indian.

Q So the approximate percentage of twenty-one per cent from GS-9 to 12 and GS-12, is the same, is that correct?

A Approximately, yes.

Q Now, in your discussions concerning the implementation, or, rather, the formulation of the new Indian Preference Policy, were you trying to carry out the intent of Congress in this?

[87] A This was our purpose, yes.

Q Can you state from your position as a personnel administrator what you would expect from this policy with respect to promotions in the area of GS-12 and above?

A I would expect that the rate of Indian people advancing into those grades would increase considerably. As far as reaching, let's say, total Indian employment, this, I am sure, will take many years. It will be, I think, a gradual process.

Q Are there certain jobs within the Bureau of Indian Affairs for which there are very few Indians qualified?

A Yes. Several of the professional occupations have very few Indians, as an example, our engineering work for us, we have very, very few Indians and, well, there are other occupations, as an example, during this period that the policy has been in effect there have been quite a number of non-Indians selected at the higher grade levels simply because there were no qualified Indian people available.

Q So promotions have been going on to non-Indians in these grade levels notwithstanding the policy?

A Yes.

Q You mentioned in your earlier testimony that the Indians' Health Service had a similar policy. The Indian Health Service is not within the Bureau of Indian Affairs, is [88] that correct?

A No, it is not. It used to be. It was transferred to what is now the Department of HEW in 1956, but upon transfer, the same policies under these Indian Preference Policies were carried over into other operations and they

are not operating from the same legislative base that we are.

Q Did they commence an Indian Preference Policy with respect to promotions at an earlier time than the Bureau of Indian Affairs?

A Yes, they did. During the period that the discussions were going on we had had several discussions with them. They had, prior to that date, extended the Preference Policy into promotions. Now, in a different way than the Bureau has, but they had actually extended the Preference into promotions.

Q What is the difference, if you can explain it?

A Well, their policy statement says something to this effect, that other things being equal, the Indian will be given preference unless there are pertinent management reasons for not giving that preference to that individual. Whereas our policy reads that if an Indian is qualified, he will receive preference, he or she will receive preference for the vacancy.

Q Under the policy as it is now being implemented, under what I understand to be sort of an interim procedures,—

[89] A Yes.

Q —the matter of non-Indians getting promotions is referred to as an exception of some sort, is that not correct?

A This is correct if for the same vacancy there is a qualified Indian.

Q Now, have applications been made for exceptions in this regard?

A Yes.

Q Are some still pending with the Bureau?

A Yes. We have several pending at this point.

Q And those decisions will be made by the Commissioner, is that correct?

A Yes. They're made by the Commissioner based upon a recommendation from his executive staff.

Q That would be Mr. Crow's office, the deputy?

A Yes. And the various directors.

Q Do you have anything to do with that recommendation, your office?

A Yes. Again, we do the staff work for that Executive Committee and for the Commissioner. We review the justification material and make a recommendation to the Director and to the Commissioner as to whether we think the exception should be granted or not.

Q Throughout your discussions leading up to the new policy, [90] was it expected that exceptions would be applied for and made from time to time?

A Yes. This was the reason the exception policy was written or exception statement was written into the policy. We do not anticipate a large number of exceptions however.

Q Now, with reference to this Excepted Service and Civil Service, would you explain to me what the Excepted Service means?

A Yes, it stems from an authority that we have from the United States Civil Service Commission that stems from the 1934 Act. And that is that we are permitted to hire into positions qualified Indians, they must be qualified for the position, those Indians who are a quarter degree of Indian blood of a federally-recognized tribe. These Indians can be hired without regard to the examining processes that are in the federal service, or what is called the competitive service.

Q Competitive is what the Civil Service Administration administers?

A Yes.

Q Approximately what part of the percentage of the employees of the Bureau, if you can give us, are in the Excepted Service, that is of the Indian employees?

A I am not absolutely sure. I would judge about fifty [91] per cent of the Indian people are in the Competitive Service, and roughly fifty per cent are in the Excepted Service. I think, if I'm in error in that, it would be to the extent that there are more in the Excepted than the Competitive.

Q Now, the Excepted Service applies only to Indians?

A That is correct.

Q And all non-Indians within the Bureau of Indian Affairs would come within the Competitive Service?

A That's correct.

Q Now, as Chief Personnel Officer of the Bureau of Indian Affairs, have you noted any serious impact on the programs of the Bureau as a result of the new policy?

A No, I have not.

Q Now, with reference to this middle management group, GS-9 through GS-12, is that the area from which management, promotion into the management of B.I.A. come from?

A Yes, that's correct.

Q Have you observed any tendency for Indians, the Indian people to have difficulty in obtaining promotion in the situation of where they are one to five in that particular grade level, promotions up to the higher grade levels?

A Well, yes. I think the statistics alone would indicate that if there is any relevancy between the percentage of [92] Indians at those grade levels, in other words, one and five, the statistics alone are a factor. One of the problems of the Bureau, the size of the Indian Bureau has is actually to keep in mind and keep well aware of the career development of all of its employees. It's very hard to do because they're spread all over the country and very remote locations and very often many people can get overlooked in this process.

This is one of the reasons why we have designed some new programs to attempt to avoid this. But those instances, if the statistics of one to five mean anything, it probably would have an effect in that kind of setting.

Q I believe you mentioned the one-quarter blood requirement comes from a 1938 executive order?

A That's my understanding, yes.

Q And one last question, the time frame requested in Plaintiffs' Exhibit Number 10 here, January 1st through June 23rd and June 24th through November 15th was specified by the Plaintiffs in the case, was it not, in that exhibit?

A Yes.

MR. ORTEGA: I think that's all we have of this witness.

MR. SHERMAN: Your Honor, may I?

[93] **THE COURT:** Mr. Sherman.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q Mr. Gunter, do the Bureau programs deal with other groups or sectors of our society other than American Indians?

A No.

Q Is this unique in the terms of a federal agency dealing exclusively with one particular minority or racial group?

A In my knowledge, it is. I only know of one other bureau that's in Interior, that deals with the Trust Territories where an agency's complete program is with one ethnic group.

Q So, other than the Indian Health Service, the Bureau has a unique status in the American government?

A Yes.

Q Does the work deal primarily with the reservation Indians?

A Yes.

Q Almost exclusively with the reservation Indians?

A It's predominantly reservation Indians.

Q Is reservation land owned by Indians?

A Yes. It's owned both by the tribe and in many instances individually by Indians, but it is owned by Indians, yes.

Q Would you characterize the effect of the Bureau programs on Indian life on or about the reservations?

MR. KULIKOWSKI: We are going to object to that [94] question. I don't think there has been any foundation laid or any competency shown on Mr. Gunter's part to testify as to something of that nature. Personnel, yes, but not life on the reservation.

THE COURT: I don't think he has qualified in that respect, counsel.

MR. SHERMAN: May I attempt to qualify him?

THE COURT: You are cross-examining the witness, this is the Plaintiffs' witness. He's an adverse witness. Do you have anything further on cross-examination?

MR. SHERMAN: Yes, I do, Your Honor.

Q (By Mr. Sherman) On these Indian Preference statutes that we're referring to, Mr. Gunter, do they have any application outside of the Bureau of Indian Affairs or Indian Health Service?

A No, they do not.

Q So, in other words, an Indian employee of HUD or NASA or other federal agency would not have the benefits of any preference?

MR. KULIKOWSKI: We are going to object to that question. I don't think Mr. Gunter is competent to testify what is going on in other agencies when employed with the B.I.A.

THE COURT: I think he's qualified as a personnel expert. I am sure he knows what is going on in personnel in other departments and agencies. You may answer the question.

[95] **A** No, the Indian Preference authorities pertain only in the Bureau of Indian Affairs within Interior and with Indian Health Service. It does apply in a very limited way with some of the other bureaus but it's very limited.

Q Mr. Gunter, showing you Defendants' Exhibit B, can you identify what this document is? Mr. Gunter, isn't that a 1946 memorandum legal opinion from the solicitor of the Department of Interior?

A Would you give me just a minute?

MR. KULIKOWSKI: We are going to object to the form of the question.

THE COURT: Just a minute, counsel. He hasn't had an opportunity to consider an answer yet.

A I am ready to answer.

Q (By Mr. Sherman) Would you identify that document, please?

A Yes. This is a 1946 or 1947 opinion of the Department of Interior of solicitor.

Q The opinion has been rendered to the Commissioner of Indian Affairs?

A No, it's to the Director of the Personnel in the Office of the Secretary.

Q Does that opinion deal with the subject of Indian Preference within the Bureau of Indian Affairs?

A Yes, it does.

[96] MR. KULIKOWSKI: We are going to object to the line of questioning. There's no competence on the part of Mr. Gunter to testify what's in a legal opinion by someone not in his office.

THE COURT: Well, he has testified as to what the document is. I am sure counsel won't ask him to express a legal opinion on the subject. The objection is overruled.

Q (By Mr. Sherman) In your review of the Indian Preference Policy within the Bureau of Indian Affairs, have you considered that document before?

A Your question is a little difficult to answer. In our review of the material on the subject of Indian Preference which was made commencing in the spring of last year leading to the present policy, we, in searching the records that we could find, we could find no reference of any document or anything which would indicate that this particular opinion had been considered at a time prior to last spring.

Now, what I'm saying is that we were not able to find any documents. I'm not saying that it was not considered. I do not know.

Q But in your review of the Indian Preference statute, have you and other employees of the Bureau had the benefit of reading that document prior to making your June 23rd policy?

A That's correct.

[97] Q And you are aware that that opinion from the solicitor recommended that preferences be granted in promotions as well as initial appointment?

A Yes.

Q To the best of your knowledge, was that recommendation of the solicitor ever followed by the Bureau of Indian Affairs during the '40's and 1950's?

A To my knowledge, no.

Q Now, Mr. Gunter, as the Chief Personnel Officer of the Bureau of Indian Affairs, is it your opinion that if Indian employees had received promotions, preferences in the area of promotion during the 1940's, '50's and '60's, this would have increased the number of Indian employees in the higher level positions?

MR. KULIKOWSKI: We're going to object to that question that there has been no showing that Mr. Gunter was employed at that time and therefore he's not competent to testify to that matter.

MR. SHERMAN: He has had complete access to the files of the Bureau.

THE COURT: I think he can express an opinion on the subject and within the limitations of his experience and the Court will consider the factor involved in it. Answer the question.

A Yes, it's my opinion that had this policy been put into [98] effect at an earlier date that the number of employees in the various grade levels at all levels would have been much greater than it is today.

Q The number of Indian employees?

A The number of Indian employees, yes.

Q Therefore it's very possible that these promotions would have resulted in Indians rising to higher—

THE COURT: Counsel, you are getting beyond the subject of this litigation. We are not trying the issue as to when it should have been put into effect. It was put into effect June 23rd and that's what we have to consider.

Q (By Mr. Sherman) Mr. Gunter, of the non-Indian workers presently with the Bureau of Indian Affairs, what percentage of this non-Indian work force is made up of other minority groups other than Indians?

A Well, the percentage is very small. Again, on the basis of the May statistics of this year of 1.7 per cent of the total employment was Black, 1.7 per cent was Spanish-American, and then other minority groups were greatly limited beyond that.

Q In other words, other minority groups would be much smaller?

A Much smaller than that percentage.

MR. KULIKOWSKI: We object to this line of questioning. I think the only thing before the Court is whether the [99] individuals receiving or not receiving Indian are Indian or not Indian or whether they are green or purple or Italian doesn't make any difference.

THE COURT: He has answered the question. If you will limit the scope of your questioning on Cross-Examination.

Q (By Mr. Sherman) Mr. Gunter, referring to the question by Plaintiffs' Counsel as to the Navajo Tribe's rejection of the Indian Reorganization Act, do you know whether the Navajos today accept or reject the benefits of Indian Preference?

MR. KULIKOWSKI: Your Honor, we're going to object to that question. I don't think Mr. Gunter is competent to answer.

THE COURT: The objection is overruled. He knows.

A The Preference Policy does apply on the Navajo Reservation, that is correct.

Q (By Mr. Sherman) Is there any Indian tribe or reservation in the United States that does not accept the benefits of Indian Preference?

A All federally-recognized tribes are entitled. The members of that tribe, if they are a quarter degree or more, are eligible for those benefits. Now, there are some tribes where the federal relationship has been terminated and it does not apply in those instances.

Q But you know of no instances where the benefits of Indian [100] Preference have been rejected by an Indian tribe or reservation?

A No, I do not.

MR. SHERMAN: I have no further questions.

MR. KULIKOWSKI: May it please the Court, we have just a few. We feel new areas were opened up by the questioning of Mr. Sherman and Mr. Ortega.

THE COURT: Yes, go ahead.

REDIRECT EXAMINATION

BY MR. KULIKOWSKI:

Q Mr. Gunter, you testified from an opinion of the solicitor's office of the Department of Interior?

A Yes.

Q Is this Defendants' Exhibit B?

A Yes.

Q And when was that opinion issued?

THE COURT: Counsel, that has been covered.

MR. KULIKOWSKI: I am sorry.

Q (By Mr. Kulikowski) Is it 1946?

A It is 1946 or 1947. I am not sure of the year.

Q Have any other opinions been issued out of the solicitor's office since 1946 bearing on this same question?

A Not in the form of a solicitor's opinion, no, that's correct. The solicitor has expressed his views in other memorandum but not in an opinion of this nature to my [101] knowledge.

Q These expressions have been recent?

A Yes, as part of this recent review.

Q Do they coincide exactly with what was in this opinion of 1946?

A It's my understanding that the solicitor's office feels that the policy now in effect is in accordance with the laws on Indian Preference.

Q And you have never heard them express any doubt as to that?

THE COURT: Counsel, you have exhausted this subject. It doesn't matter whether the solicitor takes the position, any position on it as far as this case is concerned?

Q (By Mr. Kulikowski) Mr. Gunter, does the Indian Preference Policy apply to just Indians that live on reservations?

A No. It applies to any Indian who is a member of a tribe.

Q And it's not necessary that he reside on a reservation?

A He need not physically reside on the reservation but he must be a member of a tribe that's a federally-recognized tribe.

Q Mr. Gunter, earlier you testified as to the exceptions that can be made to the new Indian Preference Policy and that you had personal experience in working with these. How many of those have you viewed in performance of your [102] official duties, requests for exceptions to the policy to promote or to take action on a non-Indian?

A I can't give you an exact figure but it's approximately fifteen.

Q Do you know of any that have been granted?

A Yes. Now, of the fifteen, there are about seven or eight that are still under review. Those that were decided, there were actually three exceptions granted but one of them was a question over an initial appointment. There are only two relating to the subject of promotion. Now, since then one of those two have been reversed, that is to say that the Indian, the qualified Indian employee in one of the two cases with the exception where granted has been placed in the position. The other is currently under a grievance consideration.

Q But one of those was a reversal?

A Yes.

Q Who reversed the Commissioner?

A No, this was reversed by the Office of the Secretary.

Q Of Interior?

A Yes.

Q So is it fair to say that he reversed the Commissioner of Indian Affairs on his decision?

A That's correct.

Q Do you have any idea, based on your experience

in this [103] area, 'how long this procedure takes of applying for an exception and how long it takes for a review by the Commissioner before a decision is made?

A Right now it has been taking a little longer because we are somewhat disrupted in Washington, but it's been taking, I would judge, about anywhere from three to six weeks or two months.

Q Of this roughly fifteen number, I believe you said seven were still pending?

A Yes.

Q Mr. Gunter, you testified earlier in response to questions from Defendants' counsel that there was a policy of similar nature applying to promotion within the Indian Health Service, HEW, and that there were differences that existed between their policy applying to promotion and that applying to promotion in the BIA. I believe you used the words with respect to the Indian Health Service "all things being equal." Could you elaborate on that and state what you mean by "all things being equal"?

A Let me explain that I have, I am not sure that I have seen the most recent issuance from the Indian Health Service because I have heard their personnel people state it two different ways. The first way was the method that I mentioned earlier and that is that if two employees' [104] qualifications are relatively equal, the Indian would be given the preference to the job, and then there's another qualifying statement on that. Now, I heard more recently, about two weeks ago, other personnel people express it in this manner, that a qualified Indian would receive priority and consideration for a vacancy.

Q You drew a distinction between that and the Indians, the BIA promotion preference, and I believe you used the word that as long as the Indian is qualified, do you mean by this, minimum qualifications?

A I mean meet the qualifications of the position, that's correct.

Q Mr. Gunter, did you earlier hear the testimony of Mr. John Arkansas?

A Yes.

Q Most specifically with respect to his testifying that as long as qualified Indians were on the list, he didn't even consider the personnel files of non-Indians, is that consistent with what you understand the policy to give?

A If you can give me a minute, let me explain what has happened. There has been some confusion throughout the Bureau.

Q If you would be responsive to my question.

A I think I can be responsive in this manner. The wire, this was a teletype wire sent to the field on June 23rd [105] of this year, stated that if the policy, somewhat in this manner, if two people are qualified for a job and one is Indian, he shall receive preference for the job. There were no interim procedures attached to that at that point, and the reason for that is that we had to develop them.

About the middle of July we sent out a draft of a manual release for a review and consideration by management people, employee unions and employees, which stated as follows, and this is the policy that we ask that they use as guidelines until such time as the policy could be approved by the Department of the Interior, and that policy stated in this manner, that following determination as to whether both the Indian and the non-Indian people were qualified, the Indian people then would be and non-Indian people would be determined as to whether, we have two categories, Qualified and Highly Qualified, from the Highly Qualified the best qualified individuals are picked, and the draft of this particular manual release stated that a certificate would be issued which would contain the best qualified Indians and the best qualified non-Indians, and also the selecting officer would be provided the list of qualified Indians. And then they were told that if a non-Indian was selected, it had to be handled as an exception.

[106] That's the reason I think that perhaps there has been some confusion, because for that first beginning three weeks there, the only statement they had was that if an Indian was qualified he receives the preference.

Now, under this interim procedure that is in effect, they would consider the best qualified non-Indians. However, if there was a desire to select that individual and there existed either a best qualified Indian or qualified Indian, it would have to be handled as an exception.

MR. KULIKOWSKI: No further questions.

THE COURT: Can you answer counsel's question after the explanation with a yes or no answer? He asked you whether Mr. Arkansas's method of handling it was within the policy as you had issued it.

THE WITNESS: Well, as far as the interim guide since July 19th, it would not be. Prior to that he exercised his judgment, and I would have said it was proper.

THE COURT: It is within the scope?

THE WITNESS: Yes, sir.

MR. KULIKOWSKI: No further questions.

THE COURT: Mr. Gunter, you mentioned the application of the Preference Policy by other agencies or departments in a limited extent. Would you elaborate on that for us a bit?

THE WITNESS: Well, what I had reference to, Your [107] Honor, is that in Interior some other bureaus can make a very limited use of the Indian Preference if the work that they are performing is of direct benefit to tribes.

Now, to my knowledge, the other bureaus have hired only about twenty-five or thirty people. Now, this is by use of the hiring authority. It has nothing to do whatsoever with the Preference Policy, however. The Preference does not apply in those instances, and I think I may have confused people with my first answer. It is simply the appointing authority that is used there, not the Preference.

THE COURT: Thank you. Anything further, counsel?

MR. ORTEGA: The government has nothing further of Mr. Gunter.

MR. SHERMAN: I just have one question, Mr. Gunter.

RECROSS-EXAMINATION

BY MR. SHERMAN:

Q Have there been any instances thus far implementing this new Preference Policy promotion where a non-Indian who is better qualified than an Indian has been placed in a position? In other words, let me rephrase that. Has an Indian been promoted when his qualifications were not equal to a non-Indian who is also competing for the same vacancy?

A I can't answer that question. The cases that I am familiar with—well, I can't answer the question. [108] In all instances—let me back up just a second.

THE COURT: Well, I think you have answered the question. I think it would be best determined by the individual handling each case.

Any further questions of Mr. Gunter?

MR. KULIKOWSKI: None.

THE COURT: If not, he may be excused.

MR. ORTEGA: May he be permanently excused, Your Honor?

THE COURT: He can be permanently excused if he wishes.

Have you completed your case?

MR. KULIKOWSKI: Yes, Your Honor.

THE COURT: How much case, if any, do you have in addition, Mr. Ortega?

MR. ORTEGA: Your Honor, as far as the government is concerned, we are only going to introduce one exhibit. Mr. Gunter was brought here at the government's request. He was to be our witness. We have already elicited the information.

THE COURT: So you only have one exhibit. Go ahead.

Mr. Sherman, do you have any proof you want to put on?

MR. SHERMAN: Your Honor, we have no witness. I would, though, like to make a brief request of this Court relating to certain problems we have had with our

anticipated [109] witness who was supposed to appear today. If I may, could I do that at this moment?

THE COURT: Yes. Go ahead.

MR. SHERMAN: We had anticipated calling a Mr. Peter McDonald, who is the Chairman of the Navajo Nation. He very much wanted to attend today but unfortunately the opening session of the Tribal Council began today and he had to preside at that session.

Our entry into this case was on such late notice that we didn't know until yesterday that Mr. McDonald couldn't be present. We view his testimony as considerably important in this case because he was going to deal with certain issues such as the continuing problems that Indian people have now that were similar to the problems they had in 1934.

He was going to also testify as to his belief that the Bureau would be considerably more effective and responsive to the needs of Indian people if Indian participation increased, and he was going to go into several of the examples that he has had on his own reservation where the Bureau hasn't been responsive because of lack of Indian participation at the higher levels.

We view this testimony as important on the Constitutional issues.

In view of that I would like to make an unusual request, and that is that we would like leave to bring Mr. [110] McDonald back to this Court, either before the three-judge panel, or before one of you, and briefly have the chance to have him testify. I know this is an unusual request.

In the alternative, perhaps we could take his deposition with all counsel being present and give each counsel a chance to cross-examine the witness. I'm sorry about this, but our late entry into this case made it impossible to make other plans in view of his unavailability.

THE COURT: Perhaps you can work out with counsel a statement that can be, a deposition or whatever. We will consider it at a later date.

MR. SHERMAN: I appreciate that, Your Honor.

MR. ORTEGA: Your Honor.

THE COURT: Yes. Go ahead.

MR. ORTEGA: I have just this one exhibit. It is a certified copy of a memorandum with respect to the present status of the training issue.

THE COURT: Do you have any objection, counsel?

MR. KULIKOWSKI: None. We discussed it.

MR. ORTEGA: It is marked as Exhibit M. It's submitted to the Court to refute the mootness of the training issue.

Other than that, Your Honor, the government has no further evidence to present.

THE COURT: Counsel, I think we'll consider the [111] legal arguments on Brief. I think the Court would prefer to handle it that way.

As far as the deposition is concerned of Mr. McDonald, that should be taken quite soon, perhaps ten days, something of that order, and if the Plaintiffs feel that there is something developed during the course of that deposition, why, of course, they will be permitted to rebut it by leave of the Court only.

So at the conclusion of the deposition, if you feel compelled to put on some rebuttal testimony, make application to the Court for permission to submit that by way of deposition or in some other form.

MR. KULIKOWSKI: That is acceptable to Plaintiffs, Your Honor. We would like to urge it be done just as soon as possible because of the nature of the relief we are praying for.

THE COURT: Yes, we are anxious to get the case disposed of. Will you take the deposition within ten days?

MR. SHERMAN: I understand that the Tribal Session ends on December 8th and we will do it the following day.

THE COURT: Well, counsel can work it out between themselves as to the day. If you have any problem about the time you will have to ask the Court to change it.

Do you have any suggestion as to the time for the Briefs?

[112] MR. ORTEGA: Your Honor, the Government does wish to submit some additional Briefing on this in addition to what we have previously done, and in view of the pending deposition within ten days we would suggest at least twenty days, because that may have some bearing upon the manner in which the Brief is drafted.

THE COURT: Twenty days?

MR. KULIKOWSKI: A maximum of twenty days.

THE COURT: That the Briefs be submitted by both sides simultaneously twenty days from this day.

The case is submitted and the Court will be in recess.

(Whereupon, the Court stood in recess at 12:12 P.M.)

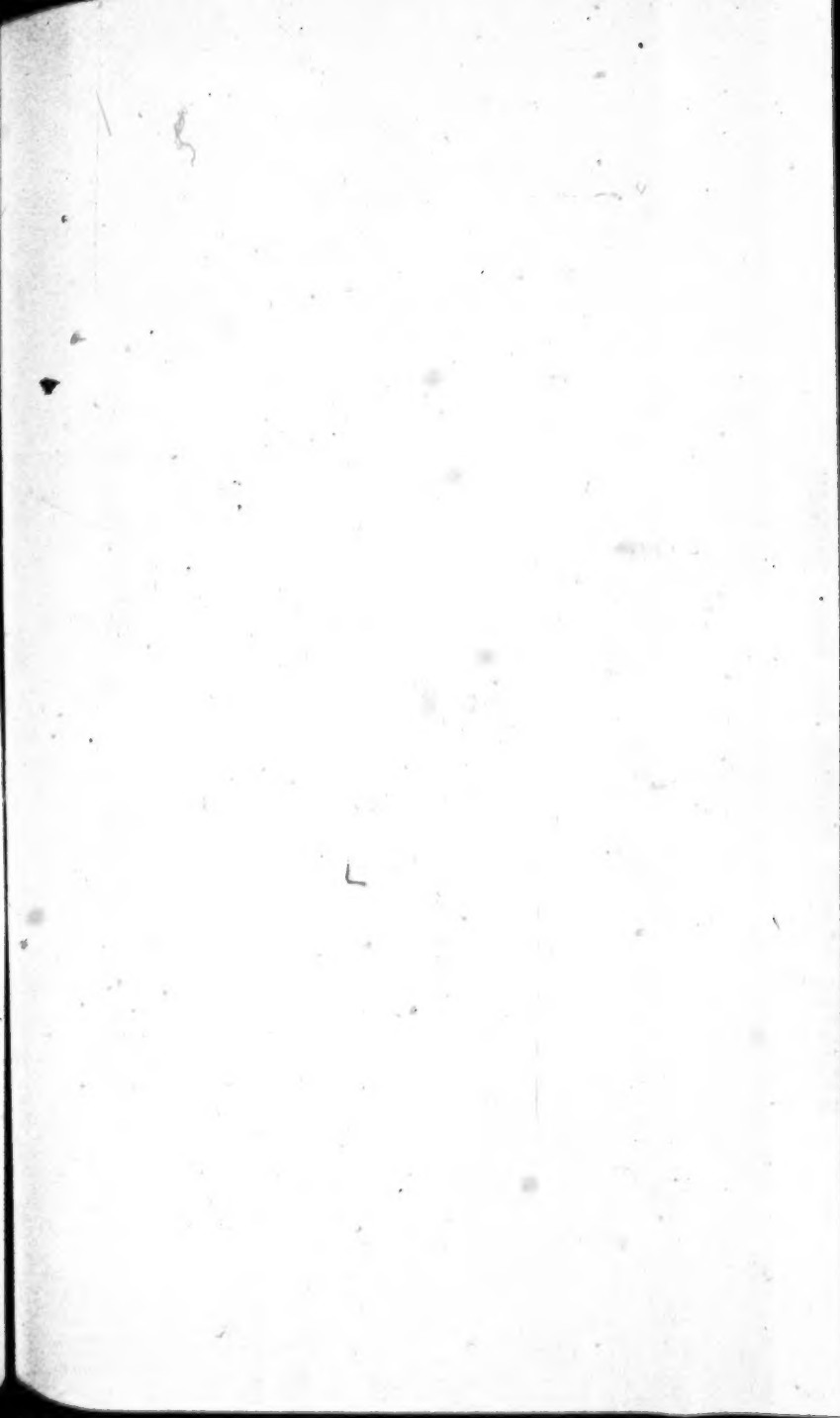
[113] REPORTER'S CERTIFICATE

I, Ada Dearnley, Official Court Reporter for the United States District Court, DO HEREBY CERTIFY that I reported pages 5 through 112, both inclusive, in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter and that the same is a true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND this 9th day of July, 1973.

Official U.S. Court Reporter



Supreme Court of the United States

No. 73-364

Answerd,

Appellant,

v.

C. R. Mancari, et al.

**APPEAL from the United States District
Court for the District of New Mexico.**

The statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 73-362 and a total of one hour is allotted for oral argument.

February 25, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

**ROGERS C. B. MORTON, SECRETARY OF THE
INTERIOR, ET AL., APPELLANTS**

v.

C. R. MANCARI, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the three-judge district court (App. A, *infra*) is not yet reported.

JURISDICTION

Appellees brought this action in the United States District Court for the District of New Mexico seeking to enjoin the enforcement of 25 U.S.C. 44, 46 and 472, the Indian Preference Laws, as violative of

the Fifth Amendment of the Constitution and as contrary to Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. II) 2000e-16. Since the constitutional claim was not insubstantial a three-judge district court was properly convened. 28 U.S.C. 2282. On June 1, 1973, the three judge district court entered a judgment (App. B, *infra*) enjoining enforcement of the Indian Preference Laws as inconsistent with the Equal Employment Opportunity Act. The government filed a notice of appeal on June 29, 1973 (App. C, *infra*). On August 16, 1973, Mr. Justice Marshall stayed the injunction pending final determination by this Court (App. D, *infra*).

The jurisdiction of this Court is conferred by 28 U.S.C. 1253; *Zemel v. Rusk*, 381 U.S. 1, 5-7.

QUESTION PRESENTED

Whether the Equal Employment Opportunity Act of 1972 repealed, by implication, the Acts of Congress giving Indians preference in employment in the Bureau of Indian Affairs of the Department of the Interior.

STATUTES INVOLVED

Section 10 of the Act of August 15, 1894, 28 Stat. 313, 25 U.S.C. 44, provides:

That in the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secre-

tary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

Section 6 of the Act of May 17, 1882, 22 Stat. 88, 25 U.S.C. 46, as re-enacted July 4, 1884, 23 Stat. 97, provides in relevant part:¹

Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

Section 12 of the Act of June 18, 1934, 48 Stat. 986, 25 U.S.C. 472, provides:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Section 717 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. (Supp. II) 2000e-16, provides in relevant part as follows:

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as de-

¹ These are sections of appropriation acts for individual years, and may have expired with their fiscal years.

defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

The appellees are non-Indian employees of the Bureau of Indian Affairs holding teaching or other positions in the federal Indian Service who complain that they were denied promotion because Indians were accorded preference for the jobs they were seeking. They brought this action on their own behalf and for the class of similarly-situated non-Indians to enjoin the Secretary of the Interior and certain named officials of the Bureau of Indian Affairs from enforcing the Indian Preference Laws.

The appellees argued that the preference laws are unconstitutional in that they deprive non-Indian employees of the Bureau of Indian Affairs of property without due process of law in violation of the Fifth Amendment; that they have been repealed by the

Equal Employment Opportunity Act of 1972; and that, in any event, they are being interpreted too broadly by the Secretary in that the laws were intended to apply only to initial hirings, not promotions (App. A, *infra*, pp. 13-14). In a memorandum opinion (App. A, *infra*) the court held that the Indian Preference laws had been tacitly repealed by the Equal Employment law. While suggesting that it could do so, the court expressly did not hold the laws unconstitutional (App. A, *infra*, p. 23).² The court's judgment "permanently enjoin[s] [the appellants] from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian * * *." (App. B, *infra*). On August 16, 1973, Mr. Justice Marshall stayed the mandate of the district court. The government now appeals the decision of the district court to this Court under 28 U.S.C. 1253.

THE QUESTION IS SUBSTANTIAL

1. The preference for Indians in the Indian Service, which existed in a fragmentary form in treaties and appropriation acts for many years, was made a general policy by Congress as part of the Indian Reorganization Act of 1934, 48 Stat. 986, 25 U.S.C. 472. See United States Department of the Interior,

² In light of its holding that the preference laws had been repealed, the court did not comment on the scope of their enforcement.

Federal Indian Law, p. 532 *et seq.* (1958). It was designed to return to Tribal Indians a measure of control over their own affairs and to increase opportunities for Indian employment.* The preference, in

* The co-sponsors of the bill spoke in plain words of the need for these laws (Senator Wheeler, 78 Cong. Rec. 11,123):

The bill also has a provision to open the way for qualified Indians to hold positions in the Federal Indian Service on the Indian reservations. At the present time, by reason of the civil service rules and regulations, we find that competent Indians are absolutely unable to take or hold positions in the Indian Service. * * *

* * * the rules and regulations of the Bureau of Indian Affairs and the civil service have been such that it has been necessary to employ white men to do the Indian work when there were Indians who were thoroughly competent to carry on their own business.

As an illustration of that let me call attention to the fact that the Indians on the Klamath Reservation, as well as on the White River Reservation and other reservations, have grown up in the timber business; and notwithstanding the fact that they knew the timber business probably as well as any white man, yet because of the fact that they have had no college education they were not permitted to be employed even as scalers of their own timber. The result has been that the Indians have been given no opportunity to handle their own affairs or to be trained in their own affairs. This bill, we think, gives them the opportunity to which they are entitled.

Representative Howard was equally to the point (78 Cong. Rec. 11,731):

I have already spoken of the difficulty which Indians experience in meeting the civil service requirements for entering the Indian Service. It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the prin-

practice, provides jobs for Tribal Indians and, equally important, ensures that the government's relations with the Tribes, at the level of the Bureau of Indian Affairs in Washington and in the field, will be informed by the special sensitivity which those who belong to the beneficiary-minority can bring to the federal Indian program.

The effect of the preference laws involving Tribal Indians in the Indian Service is dramatic. In 1934, there were approximately 2,100 Indians employed by BIA out of about 6,500 employees, or about 34% (Tr. 84).⁴ By 1972, under the operation of the statute, the number had grown to 57% of a total employment of approximately 16,500 (Tr. 85). Until recently, the government applied the preference only to initial hiring in the Indian Service, not to promotions (Tr. 80-82). With present, more vigorous application of the laws (which apparently precipitated this suit, see *e.g.*, Tr. 7-8), considerable progress has been made in giving Indians the opportunity to make the decisions and to do the work needed for their own betterment. Removing the preference given Indians in the Indian Service would seriously undermine this important congressional policy.

ciple that the Indian Service shall gradually become, in fact as well as in name, an Indian service, predominantly in the hands of educated and competent Indians.

⁴ "Tr." refers to the transcript of the trial held November 29, 1972, which we are lodging with the Clerk. The references above and which follow are to the testimony of Raymond Gunter, Chief Personnel Officer of the Bureau of Indian Affairs.

2. The district court erroneously held that the enactment of Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16, repealed the Indian preference laws. Nothing in the Equal Employment Act or its legislative history indicates an intention to repeal the specific and long-standing legislation giving Indians a preference in the Indian service. Nor would one expect that result. The legislative policy in both cases was really the same: to protect minority employment. Indeed, the 1972 law was an amendment to the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, which specifically exempts Indian Tribes from the definition of "employer," 42 U.S.C. 2000e, and provides that businesses or enterprises located near Indian reservations can give preferential treatment to Indians, 42 U.S.C. 2000e-2(i) (Section 703(i) of the Act). According to its sponsor, Senator Humphrey, "[t]his exemption is *consistent* with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. 12,723. There is no reason to believe that, in passing the 1972 Act amending the 1964 legislation—without any debate on or specific reference to the subject—Congress intended to abolish the preference given to Indians for employment in the Indian service, particularly on reservations, while preserving Indian preferences in private employment near reservations and in tribal employment.*

* See, also, 20 U.S.C. (Supp. II) 887c(d), 86 Stat. 340, enacted June 23, 1972, two months after the Equal Employment

To the contrary, this is a classic case for applying the settled canon of statutory construction that repeals by implication are not favored and should be avoided where possible. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549; *United States v. Borden Co.*, 308 U.S. 188, 198. The controlling rule here is that, in the absence of strong indications, special statutes (such as the Indian Preference statutes) are not impliedly repealed by a general statute (such as the Equal Employment Opportunity Act), but, rather, survive as exceptions to the new law. *Rodgers v. United States*, 185 U.S. 83, 87-88; *Ex Parte Crow Dog*, 109 U.S. 556, 570; *Bulova Watch Company v. United States*, 365 U.S. 753, 758. There was no shift in governmental policy with respect to Tribal Indians between 1964 and 1972, nor any other evidence, that would justify the inference that, in the latter year, Congress meant to reverse direction and repudiate the settled practice, re-confirmed in 1964, of recognizing a preference for Indians in limited areas of special concern to them.* But, if there be any doubt on this score, the legislation must be construed most favorably to the Indians. See *Squire v. Capoe-*

Act, in which Congress provided a preference for Indians to receive grants in programs designed to prepare persons to serve Indian children "as teachers, teachers aides, social workers, and ancillary educational personnel."

* Moreover, the Equal Employment Act is essentially a civil service law concerning federal employment, and 25 U.S.C. 472 expressly provides for an exemption from civil service laws for employment of Indians in the Indian Service.

man, 351 U.S. 1, 6-7; *Menominee Tribe v. United States*, 391 U.S. 404.

3. The Indian Preference Laws are not unconstitutional. We stress that the benefit of the preference extends only to Indians who are members of Tribes recognized by the Department of the Interior and whose affairs are administered by the Bureau of Indian Affairs (Tr. 90, 99). Accordingly, we are not confronted with strictly racial legislation. At all events, it is well settled that Congress enjoys plenary power to make laws for the protection of Tribal Indians. Far from offending constitutional principles, that doctrine has its roots in the Indian Commerce Clause of the Constitution (Article I, Section 8, Cl. 3), which recognizes Indian Tribes as separate "nations", dependent on the United States. See *McClanahan v. Arizona State Tax Commission*, No. 71-834, decided March 27, 1973, slip op., pp. 4-10, especially p. 8, note 7; *Board of County Commissioners v. Seber*, 318 U.S. 705, 715. The unique history of our relations with the Indian Tribes, recognized by the Constitution and continuing to the present day, permits special arrangements that would not be appropriate with respect to other groups. Accordingly, nothing in the Fifth Amendment prohibits Congress from making special laws affecting Indians, and conferring upon them advantages not enjoyed by the population at large. See *McClanahan*, *supra*; *Mescalero Apache Tribe v. Jones*, No. 71-738, decided March 27, 1973, slip op., pp. 13-14.

The Bureau of Indian Affairs is unusual in that

it serves only one ethnic group (Tr. 93), albeit not all members of that minority. Such Indians do not receive a preference in other branches of government (other than the Indian Health Service which has been transferred from the BIA to the Department of Health, Education and Welfare) (Tr. 94-95). The preference is a rational attempt by Congress to meet a special and long standing social problem by encouraging renewed participation in their own affairs by a people who had previously been subjected by the federal government itself to a role of dependence. There is no reason, by invoking novel constitutional doctrine or strained statutory construction, to reverse that policy today.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

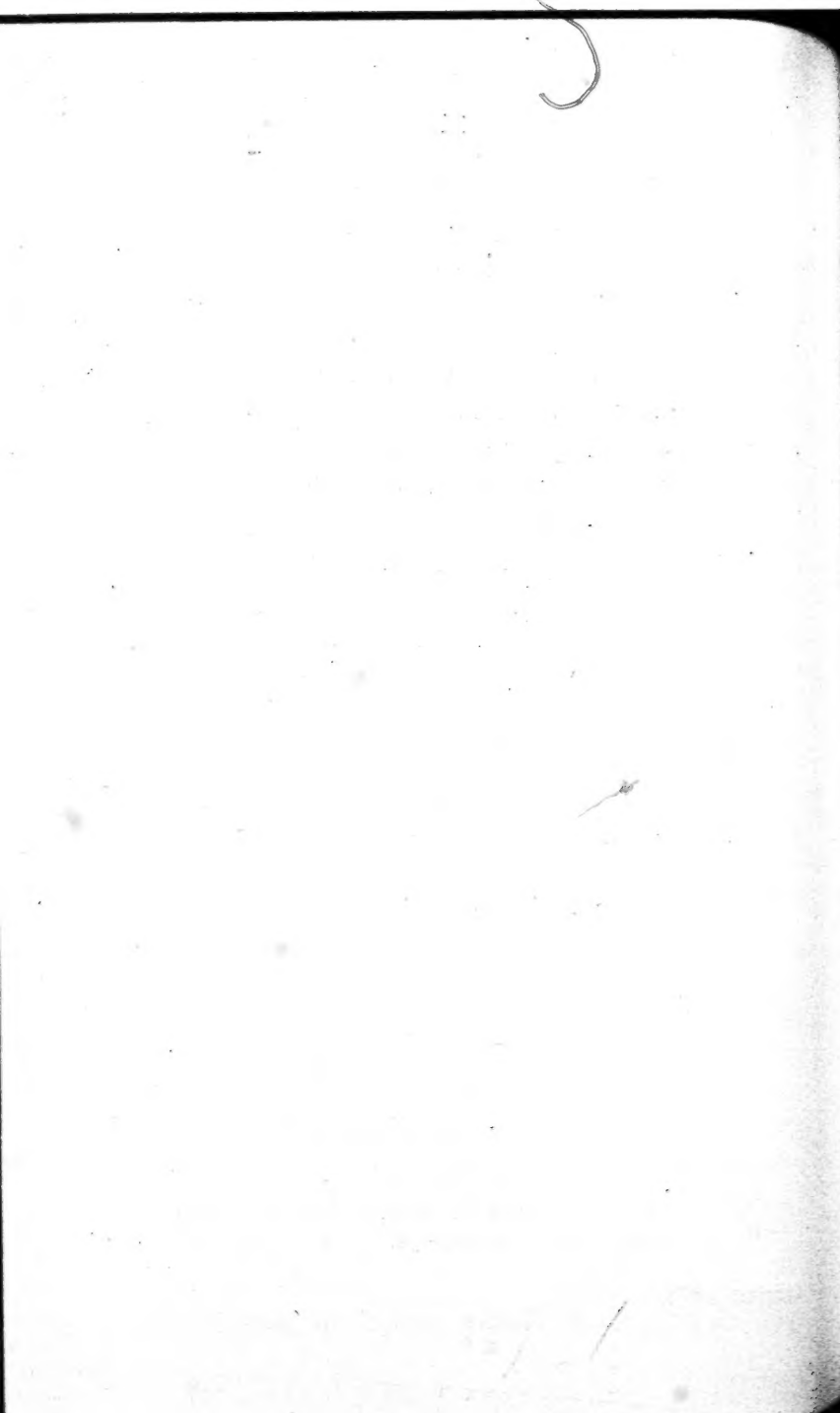
Respectfully submitted.

ROBERT H. BORK,
Solicitor General

WALLACE H. JOHNSON,
Assistant Attorney General

CARL STRASS,
EVA R. DATZ,
Attorneys.

AUGUST 1973.



APPENDIX A**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO****No. 9626 Civil.****C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and JULES COOPER, on behalf of themselves and all others similarly situated, PLAINTIFFS****v.****ROGERS C. B. MORTON, as
Secretary of the Interior, et al., DEFENDANTS****MEMORANDUM OPINION****Filed at Albuquerque, June 1, 1973**

This is a class action brought by the named plaintiffs on behalf of themselves and all other employees of the Bureau of Indian Affairs who are of less than twenty-five per cent Indian blood. Plaintiffs seek to enjoin the defendants from implementing and enforcing a policy of the Bureau of Indian Affairs to give preference to persons of one-quarter or more Indian blood in initial hiring, training, promotion, and reinstatement.

Plaintiffs allege that Title 25, United States Code, §§ 44-46 and 472 (hereinafter the Indian Preference Statutes), are being improperly construed by the Secretary and the Commissioner in that these sections were meant to extend a preference to Indians in initial hiring only. Plaintiffs further allege that this expanded policy violates their rights under the Civil Rights Acts of 1964 and 1972, which rights are

guaranteed them in Title 42, United States Code, §§ 2000e et seq., and Public Law 92-261, § 717. Finally plaintiffs allege that the Indian Preference Statutes are unconstitutional because they deprive plaintiffs of their rights to property without due process of law in violation of the Fifth Amendment to the United States Constitution.

The non-Indian plaintiffs are longtime employees of the BIA. They are teachers at the Albuquerque Polytechnic Institute, or programmers, or in computer work, or teachers in other areas. They testified as to particular training or advancements for which they had applied, and which in their opinion were denied by reason of the application of the preference policy. We find that the plaintiffs demonstrated sufficient connection with the application of the policy to bring this action for themselves and others similarly situated.

The defendants are persons occupying official positions relating to the BIA and are responsible for the application of the Acts herein concerned.

We find that there are asserted substantial constitutional questions requiring consideration by a three-judge court.

The United States Attorney, who appears for the defendants, challenges the court's jurisdiction over the subject matter. The Court of Appeals in *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir.), held that there was jurisdiction under 5 U.S.C. § 704 in that action. Here the plaintiffs assert jurisdiction under 42 U.S.C. § 2000e and 28 U.S.C. § 1346(a)(2). This could be considered under the latter statute since the action was against "Rogers C. B. Morton, as Secretary of the Interior," and against other named persons in their official capacities. As indicated, the United States Attorney has

appeared as counsel for the defendants. However, we hold that there is jurisdiction under 42 U.S.C. § 2000 e, and any further challenge before the Department concerned would be an idle gesture in the face of the issuance of the policy statement and its implementation by regulations and orders. The issue is not an interpretation of policy statements or their application, but is a direct challenge to the validity of the statute on which the departmental policy is based. There is thus no purpose shown why any further administrative action would serve any useful purpose. *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir.), we believe, is significant on this point although it dealt with 5 U.S.C. § 704 where no administrative machinery was expressly provided.

Defendants contend that they are directed by 25 U.S.C. § 472 to implement the policy of Indian preference. Section 472 provides as follows:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Other statutory provisions relating to preference, although less explicit, appear at 25 U.S.C. §§ 44 and 46.

The gist of the preference policy which precipitated the challenge was embodied in Personnel Management Letter No. 72-12, issued by the Albuquerque Area Office of the BIA, which provided in part as follows:

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian preference to training and filling vacancies by original appointment, reinstatement and promotions. . . .

"The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. . . ."

The policy was officially announced and, as we find from the evidence that it is being carried out, applies the preference in hiring and promotions. Instances of promotional preferences were testified to by the witnesses. The policy is thus a reality, and far beyond the formative stage.

A preliminary issue relates to the validity of 25 U.S.C. § 472, quoted above, in view of its inclusion in the heterogeneous Indian Reorganization Act of 1934. This provision was included in the Reorganization Act together with other sections which relate to a variety of subjects. In one of the sections, now 25 U.S.C. § 478, provision is made for submission of "the Act" for acceptance or rejection by the various Indian tribes. This voting section (478) on its face would appear to make the application of section 472, with which we are here concerned, optional with individual tribes by requiring a special election of the adult members of the tribe to vote on the application of the entire Act.

The Reorganization Act was submitted and voted on and was rejected by a considerable number of

tribes. This rejection and acceptance tribe by tribe creates some uncertainty, but a careful reading of the other sections, as well as a review of the Congressional history of the Act, convinces us that the elections were to be only for the purpose of accepting or rejecting sections 476 and 477 of Title 25, 48 Stat. 987-88. For example, we cannot believe that Congress intended all the Indian tribes to vote on the extension of boundaries of the Papago Reservation (section 463a, 50 Stat. 536), on the Secretary making rules and regulations for the operation and management of Indian forestry units (section 466, 48 Stat. 986), or on appropriations for vocational and trade schools (section 471, 48 Stat. 985), or on other provisions found in the Indian Reorganization Act. It is difficult to see how under any other construction the Act would be valid.

Senator Wheeler, one of the sponsors of the Reorganization Act, made the following remarks in his discussion of sections 476 and 477 of the Act:

"The third purpose of the bill is to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations. This provision will apply only if a majority of the Indians on any Indian reservation desire this sort of organization. As a matter of fact, however, it does not change to any great extent the present tribal organization, except that when a majority of the Indians want to establish this tribal organization and extend the provisions of the bill to it, they may do so." (1934 Congressional Record, p. 11123).

Nothing which followed in the debate or in the way of amendments suggests to us that the option of acceptance was extended to any other portion of the Act, and therefore the preference section here concerned must be held to extend to all Indians as individuals.

The issue of the proper construction of 25 U.S.C. § 472 is urged on this appeal and is a significant problem. The United States Court of Appeals for the Tenth Circuit in *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956, considered the application of the preference statutes to reductions in the work force of the Bureau of Indian Affairs, and held the preference not applicable. There section 472 was considered, as were sections 44 and 46 of 25 U.S.C., and references were made to the legislative history. The parties and the court were there concerned only with the particular issue at hand. There was no other issue nor a general challenge to the Act. The preference thus does not apply to reductions in the work force.

The United States District Court for the District of Columbia, in *Freeman v. Morton*, Civ. No. 327-71 (not yet reported), had before it the question of whether or not section 472 gave the plaintiff a preference over all non-Indian employees in the Bureau of Indian Affairs with respect to promotions, reassignments to vacant positions within the BIA, and to assignments to available training positions (the contrary position was that the preference was only as to initial hiring). The district court in *Freeman* held that section 472 required the preference be given in promotions and reassignments to vacant positions within the Bureau, but that it did not extend to positions in training programs.

We do not decide whether the preference is as broad as the court in *Freeman v. Morton* indicates. It is sufficient to permit consideration of the basic issue to observe that no one challenges the application of the preference acts to initial hiring and indeed the wording does not permit such a challenge.

We turn now to the asserted conflict between the Indian Preference statute and the Civil Rights Acts of 1964 and 1972 (Equal Employment Opportunity Act, 1972, Public Law 92-261). As indicated above plaintiffs assert that the Indian Preference Policy adopted and implemented by the Bureau is in direct conflict with the Civil Rights Act of 1964 and 1972, and more specifically with Title 42, United States Code, § 2000e-2 and as amended by Public Law 92-261. Plaintiffs in their challenge to the preference acts thus assert that the Bureau, by refusing to obey the Congressional mandate set forth in section 717 of Public Law 92-261, is violating the rights given them under that added section.

Section 717 provides in part as follows:

"Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units

of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

On its face, section 717 applies to all agencies of the federal government. There is nothing in the Committee Report or in House Report No. 92-238, accompanying H. R. 1746, enacted into law as Public Law 92-261, which would indicate that the Bureau of Indian Affairs be excepted from its provisions (see 1972 U.S. Code Cong. & Ad. News, pp. 2137, 2157). Exceptions are contained in the Act, but none as to the Indians or the Bureau.

Senator Byrd of West Virginia, speaking in favor of the bill, made the following remarks:

"I do not favor special treatment or special consideration or favored employment of any individual on the basis of that person's being black or white, male or female. . . . Notwithstanding what I have just said, the fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States. . . .

"In other words, he should rise or fall on the basis of merit, not on the basis of race or religion or sex. Every qualified individual—black, white or else—should be given an equal chance—not preferential treatment—at employment." (Congressional Record, January 26, 1972, at s. 590).

And Senator Humphrey, speaking for the bill, made the following statement:

"We must make absolutely clear the obligation of the Federal Government to make all personnel actions free from discrimination based on race, color, sex, religion, or national origin." (Congressional Record, January 20, 1972, at ss. 172-173).

The United States Supreme Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424, at 430-31, held as to Title VII:

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

The Eighth Circuit has also held that Title VII forbids reverse discrimination. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.). See also *Jackson v. Poston*, No. 18296, New York Sup. Ct.

Should section 717 of Public Law 92-261 take precedence over the Indian Preference Statutes? Although we are reluctant to hold that Congress has overridden by subsequent legislation long existing statutes without specific reference to them, we must conclude that this was done in this instance.

The Equal Employment Opportunity Act of 1972 is a clear, emphatic directive by Congress that all positions in the competitive civil service of the federal government should be filled without regard to race, religion, sex, color, or national origin. It is subject to no other interpretation, and as indicated, there were exceptions placed in it, so Congress considered limitations on its scope, but none was included as to the Bureau of Indian Affairs. Thus the several preference statutes were overridden, and the Bureau must conform to the broad sweep of section 717.

This is not a simple instance of a relationship of a general statute to a special subject statute which often occurs. Each statute purports to cover the same particular subject of personnel actions relating to, as section 717 described them, "... discrimination based on race, color, religion, sex, or national origin." One Act applies to all but some excepted bureaus or agencies and the other to the "Indian Office." This is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes. Further by the nature of the subject matter and scope, the two cannot exist side by side. See *Posadas v. National City Bank*, 296 U.S. 497.

There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion. *Griggs v. Duke Power Co.*, 401 U.S. 424. There was no evidence whatever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

We do not consider that Board of County Comm'rs v. Seber, 318 U.S. 705, or Simmons v. Eagle Seelatsee, 384 U.S. 209, led to a contrary conclusion. It is apparent that Indian tribes have been the subject of particular legislation from time to time. But this of itself is no reason for a different treatment of Indians generally. Indians as such are not considered to have rights, so far as here pertinent, different from other citizens; they are citizens and are obviously entitled to all rights, privileges, and burdens thereof.

We have not considered the challenge by plaintiffs to the constitutionality of the preference statutes. This issue involves the consideration of the reasonable governmental purpose or objective sought to be attained in creating the preferred position for certain persons having a stated percentage of Indian blood as compared to others. There was testimony as to the manner in which certain non-Indians were affected by the policy. The separate treatment was thereby established together with its impact on the individuals. The defendants had the burden of coming forward with evidence of an important governmental objective but put on no evidence directed to this matter. Under these circumstances, we could well hold that the statute must fail on constitutional grounds, but instead we hold as above described that the preference statutes must give way to the Civil Rights Acts.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard Bratton
United States District Judge

/s/ E. L. Meechem
United States District Judge

APPENDIX B**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

No. 9626 Civil

C. R. MANCARI, *et al.*, PLAINTIFFS**v.****ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*****[Filed at Albuquerque, Jun. 1, 1973]****JUDGMENT**

IT IS ORDERED, ADJUDGED AND DECREED that the named defendants are hereby permanently enjoined from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian, since 25 U.S.C. §§ 44, 46 and 472 are contrary to the Civil Rights Act, and are inoperative.

IT IS SO ORDERED.

**/s/ Oliver Seth
United States Circuit Judge**

**/s/ Howard Bratton
United States District Judge**

**/s/ E. L. Meechem
United States District Judge**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, *et al.*, PLAINTIFFS

—vs—

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*

[Original Filed Jun. 29, 1973]

NOTICE OF APPEAL

NOTICE is hereby given that the defendants Rogers C. B. Morton, as Secretary of the Interior, Louis R. Bruce, as Commissioner of Indian Affairs, Walter O. Olson, as Area Director, Bureau of Indian Affairs, Albuquerque Area Office, and Anthony Lincoln, as Area Director, Bureau of Indian Affairs, Navajo Area Office, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on June 1, 1973. This appeal is taken pursuant to the provisions of 28 U.S.C., Section 1253.

/s/ Victor R. Ortega
VICTOR R. ORTEGA
United States Attorney
Post Office Box 607
Albuquerque, New Mexico 87102
Attorney for Defendants

PROOF OF SERVICE

I hereby certify that I mailed a true copy of the foregoing Notice of Appeal by depositing the same in a United States Post Office, first class mail, to counsel for defendants, John M. Kulikowski, Post Office Drawer 1126, Albuquerque, New Mexico 87103, and to counsel for Intervenor, Harris D. Sherman, 1130 Capitol Life Center, Denver, Colorado 80203, this 29th day of June, 1973.

/s/ Victor R. Ortega
VICTOR R. ORTEGA
United States Attorney

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-188

ROGERS C. B. MORTON, Secretary
of the Interior, *et al.*, PETITIONERS

v.

C. R. MANCARI, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the execution and enforcement of the judgment of the United States District Court for the District of New Mexico in Case No. 9626 Civil be, and the same is hereby, stayed pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the District of New Mexico affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ Thurgood Marshall
Associate Justice of
the Supreme Court
of the United States

Dated this 16th of August 1973.

JAN 29 1974

MICHAEL DOOK, JR., CLERK

CASE FILED 8-2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*,
Appellants,

—and—

AMERIND,
Intervenor-Appellant,

—v.—

C. R. MANCARI, *et al.*,
Appellees.

**JURISDICTIONAL STATEMENT ON BEHALF OF
INTERVENOR-APPELLANT AMERIND**

STUART J. LAND
1229—19th Street, N.W.
Washington, D.C. 20036

HARRIS D. SHERMAN
1130 Capitol Life Center
Denver, Colorado 80203

*Attorneys for Intervenor-
Appellant Amerind*

Of Counsel:

PATRICK F. J. MACROBY
1229—19th Street, N.W.
Washington, D.C. 20036

Dated: January 29, 1974

RESPONSE NOT PRINTED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*,

Appellants,

—and—

AMERIND,

Intervenor-Appellant,

—v.—

C. R. MANCARI, *et al.*,

Appellees.

**JURISDICTIONAL STATEMENT ON BEHALF OF
INTERVENOR-APPELLANT AMERIND**

**Introduction—Noting of Probable Jurisdiction in
Government's Appeal from Same Judgment**

This action was brought in the United States District Court for the District of New Mexico, by four non-Indian employees of the Bureau of Indian Affairs (the "Bureau") challenging the validity of the so-called Indian Preference Statutes, which *inter alia* require the Bureau to give preference to Indians in "appointment[s] to vacancies" within the Bureau. On November 20, 1972, the District Court granted the motion of Intervenor-Appellant Amerind, a nonprofit organization representing Indian employees of the Bureau of Indian Affairs, to intervene as a party in the proceeding (Appendix A), which motion specifically asserted that the Government was unable adequately to

represent the interests of the Bureau's Indian employees. Following a hearing in which Intervenor-Appellant Amerind actively participated, a three-judge panel of the District Court entered judgment on behalf of Plaintiffs. (Appendix B)

On August 28, 1973, Intervenor-Appellant Amerind filed a Jurisdictional Statement with this Court in typewritten form, together with a Motion to Dispense with Printing of the Jurisdictional Statement. On the same day, the Government filed its Jurisdictional Statement on appeal from the same judgment, *Rogers C. B. Morton, et al. v. C. R. Mancari, et al.*, No. 73-362.

On January 14, 1974, the Court entered an Order noting probable jurisdiction in the Government's appeal. On the same day the Court entered an Order in this appeal denying the Motion to Dispense with Printing the Jurisdictional Statement, with leave to file a printed appeal on or before January 29, 1974. This Jurisdictional Statement is being submitted in accordance with that Order.

At the outset, we respectfully urge the Court to take the actions necessary to permit Amerind to present its own views to the Court in this case at the same time as the Government presents its appeal. The two appeals are from the same judgment. Moreover, while the Government and Amerind both contend that the Indian Preference Statutes are valid, there remain substantial differences between them as to the precise scope, operation and purpose of those statutes. Indeed, as noted, this was the ground on which Amerind's intervention below was based.* In view

* We refer this Court to the case of *Freeman v. Morton*, — F.Supp. — (D.D.C. 1972), described in detail at pp. 10-11 of this Statement, in which a number of Indian employees of the Bureau brought suit against the Government challenging the Bureau's narrow application of Indian Preference.

of the substantial disagreement between the Indian employees of the Bureau and the Bureau itself as to the precise extent of Indian Preference, we submit that it is essential for representatives of those Indian employees to be permitted to participate in the appeal from the judgment below. Furthermore, since probable jurisdiction has already been noted in the Government's appeal, we respectfully urge this Court to expedite consideration of this Jurisdictional Statement.*

Opinion Below

The opinion and judgment of the three-judge District Court for the District of New Mexico held that 25 U.S.C. §§ 44, 45, 46 and 472, known as the Indian Preference Statutes, had been impliedly repealed by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2, and enjoined the defendants from implementing such statutes. Copies of the opinion and judgment of the District Court, which have not been reported, are attached to this Statement as Appendix B.

Jurisdiction

Plaintiffs, four non-Indian employees of the Bureau of Indian Affairs ("the Bureau") brought this action on behalf of themselves and of all other non-Indian employees

* Appellees have already responded to the issues raised in this Jurisdictional Statement, in their Motion to Dismiss Appeal and to Affirm the Decision of the Lower Court, dated December 14th, 1973, responding to both the Government's appeal and Amerind's typewritten appeal. The only difference between Amerind's typewritten appeal and this document are the addition of this introduction and the addition of the second footnote on page 8.

of the Bureau, seeking to enjoin the defendants, the Secretary of the Interior and certain officials of the Bureau ("the Government"), from implementing and enforcing a policy of the Bureau giving preference to qualified Indians in initial hiring, training, promotion, and reinstatement. Plaintiffs alleged that the statutes under which this policy was implemented, 25 U.S.C. §§ 44, 45, 46 and 472, were unconstitutional, or, alternatively, that they had been impliedly repealed by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2. Plaintiffs invoked jurisdiction under 28 U.S.C. § 1346(a)(2). Intervenor-Appellant Amerind, a nonprofit organization representing Indian employees of the Bureau, was permitted to intervene as a party defendant in the case by order of the District Court dated November 20, 1972.

The judgment of the District Court was entered on June 1, 1973. Notices of Appeal were filed by the Government and by Amerind on June 29, 1973. (Appendix C)

Jurisdiction over this appeal is conferred upon this Court by 28 U.S.C. § 1253. Plaintiffs sought an injunction restraining enforcement of the Indian Preference Statutes in part upon constitutional grounds, and the case was therefore required by 28 U.S.C. § 2282 to be heard and determined by a three-judge district court. In these circumstances this Court has jurisdiction to hear the appeal under § 1253, notwithstanding the fact that the District Court did not directly rule upon the constitutional issue. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 90-91 (1968); *Zemel v. Rusk*, 381 U.S. 1, 5-6 (1965); *Brotherhood of Locomotive Engineers, et al. v. Chicago Rock Island and Pacific Railroad Co., et al.*, 382 U.S. 423, 428 (1966); *Florida Lime Growers v. Jacobsen*, 362 U.S. 73, 84-85 (1960).

Statutes Involved

The Indian Preference Statutes provide as follows:

(1) 25 U.S.C. § 44, 28 Stat. 313 (1874):

In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

(2) 25 U.S.C. § 45, 4 Stat. 737 (1834):

In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.

(3) 25 U.S.C. § 46, 22 Stat. 88 (1884):

Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

(4) 25 U.S.C. § 472, 48 Stat. 986 (1934):

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Section 717(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e-2, provides as follows:

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in Section 102 of Title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in Section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Questions Presented

1. Whether the District Court erred in holding that in passing the Equal Employment Opportunity Act of 1972, which generally prohibited discrimination in employment in the Federal Government, Congress had impliedly repealed a statute passed nearly forty years earlier which specifically gave preference to qualified Indians in employment in the Bureau of Indian Affairs, together with earlier Indian Preference Statutes.

2. Whether the Indian Preference Statutes, 25 U.S.C. §§ 44, 45, 46 and 472, which were designed to improve the

operation of the Bureau of Indian Affairs and to permit Indians to govern their own affairs, violate the Fifth Amendment of the United States Constitution.

Statement of the Case

Before describing the proceeding below, we believe that it would be helpful to outline the history and nature of Indian Preference.

1. Indian Preference

On three separate occasions between 1834 and 1894 Congress expressed its clear intention to encourage the employment of Indians by the Government agency charged with the conduct of Indian affairs. The statutes concerned, 25 U.S.C. §§ 44, 45, and 46, are set forth above. However, as the legislative history of the 1934 statute, 25 U.S.C. § 472, makes clear, the Bureau of Indian Affairs had failed to put these Congressional directives into effect; so that by 1934 the Bureau actually employed proportionately fewer Indians than in 1900.* Thus Senator Norbeck stated during the hearings on the bill that became the Indian Reorganization Act of 1934:

"I think we have utterly fallen down in the present system. The Indian has been excluded. The reservation has been filled up with white people who live off the Indians." *Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., pt. 2, at 259 (1934).*

* Memorandum on S. 2755 submitted to the Senate Committee on Indian Affairs by John Collier, Commissioner for Indian Affairs, reprinted in *Hearings on S. 2755 and S. 3645 before Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., pt. 1, at 19 (1934).*

Congress accordingly passed Section 472 of the 1934 Act, which provides that "... qualified Indians shall hereafter have the preference to appointment to vacancies" in the "Indian Office." * The main purposes of Section 472, as appears from the extensive legislative history, were to improve the function of the Indian Office, which Congress believed had lamentably failed in its duties, and to provide the Indians with a degree of self-government. As the United States Court of Appeals for the Tenth Circuit recently stated:

"[Section 472] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian. Specific concern was directed to reforming the B.I.A., which exercised vast power over Indian lives but was staffed largely by non-Indians. Through the preference given to Indians by § 472, it was hoped that the B.I.A. would gradually become an Indian Service predominantly in the hands of educated and competent Indians." *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956, 960 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971). **

For thirty-eight years after passage of the 1934 Act, the Bureau construed the term "appointment to vacancies" to mean only initial hirings from outside the Bureau. Thus, Indian Preference applied only where qualified Indian and

* The functions of the Indian Office are now performed by the Bureau of Indian Affairs, which is part of the United States Department of the Interior, and the Indian Health Service, which is part of the United States Department of Health, Education, and Welfare. The Indian Health Service regards itself as subject to the Indian Preference Statutes.

** That case held that the Indian Preference Statutes do not apply to reductions in force.

non-Indian applicants were competing from outside the Bureau for a position in the Bureau. Indian Preference was not applied to promotions or reassignments within the Bureau. Indian employees of the Bureau consequently made little headway. As the Court of Appeals stated in *Mescalero*:

"As the non-Indian employees retired or moved on to other jobs, competent Indians were expected to have taken their place. Unfortunately, this has apparently not happened, especially in the policy-making positions." *Mescalero Apache Tribe v. Hickel, supra*, 432 F.2d at 960.

Testimony in this case indicated in May, 1972, 57 percent of the 16,500 employees of the Bureau were Indian. However, 76 percent of the employees at GS-7 and below were Indian, and only 21 percent of the employees at GS-9 and above were Indian.*

On June 23, 1972, Defendant Morton, the Secretary of the Interior, announced that the Bureau was planning to implement a new Preference Policy, under which Indian Preference would be extended to reinstatement, promotion and training. However, subsequent policy statements released by the Bureau indicated that Indian Preference would not extend to training, or to lateral transfers and reassignments where no grade advances or salary increases were involved,** and that exceptions to Indian Preference would be granted under certain circumstances.

* Testimony of Raymond Gunter, Transcript of Final Hearing on the Merits, November 29, 1972 (hereafter "Tr."), at 85-86.

** A lateral transfer is a job movement between different offices within the Bureau; a reassignment is a job movement within the same office.

2. *The Freeman Case*

Before the new Preference Policy was announced, four Indian employees of the Bureau brought suit in the United States District Court for the District of Columbia against the Secretary of the Interior and certain officials of the Bureau challenging the narrow interpretation of the Indian Preference Statutes then in operation, and alleging that Indian Preference should be extended to the areas of promotion, reassignment and training. Following the announcement of the new policy in June, 1972, the Government moved to dismiss the case on grounds of mootness, arguing that the new policy interpreted the statutes in the manner sought by the plaintiffs. The plaintiffs, however, resisted this motion, arguing that the statutes applied to all job movements, including lateral transfers and reassignments not involving promotion, and that they did not permit exceptions to be made. On December 21, 1972, the District Court (Corcoran J.) granted summary judgment in favor of plaintiffs (except on the training issue, as to which he held for the defendants), and held that 25 U.S.C. § 472 required that Indian Preference apply to "all initial hirings, promotions, lateral transfers and reassignments" in the Bureau, and that no exceptions could be granted. *Enola Freeman, et al. v. Rogers C. B. Morton, et al.*, Civ. No. 327-71.* A copy of the opinion is attached to this Statement as Appendix D.

* The Government has appealed the decision to the extent that it applies Indian Preference to lateral transfers and that it denies authority to grant exceptions. Briefs have been filed by both sides with the United States Court of Appeals for the District of Columbia Circuit.

Although the constitutionality of the Indian Preference Statutes was not at issue in *Freeman*, the Court noted in *dictum* that not all classifications based on race are invalid. It also commented that the Indian Preference Statutes appeared to be a rational exercise of Congress' broad powers to "... do all that [is] required ... to prepare the Indians to take their place as independent, qualified members of the modern body politic," citing *Board of County Commissioners v. Seber*, 318 U.S. 705 (1943) (App. D, p. 41, n. 3).

3. The Proceeding Below

Following the announcement in June, 1972 of the new Indian Preference Policy, plaintiffs, four non-Indian employees of the Bureau in Albuquerque, New Mexico, brought this action seeking to enjoin defendants from enforcing the new policy. Plaintiffs attacked the Indian Preference Statutes on two grounds: first, that they deprived plaintiffs of their right to property without due process of law, thereby contravening the Fifth Amendment of the United States Constitution; and second, that they were in direct conflict with the rights of non-Indian employees of the Bureau protected under the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2.

Upon motion of plaintiffs, a three-judge panel of the District Court was convened to hear the case, since plaintiffs sought to enjoin the enforcement of federal statutes, in part upon the ground that they were repugnant to the United States Constitution. The District Court held that the action could proceed as a class action.

On June 1, 1973, following a hearing on the merits, the District Court entered judgment in favor of plaintiffs. It

held that the Indian Preference Statutes had been impliedly repealed by the Equal Employment Opportunity Act of 1972, which provides that personnel actions affecting employees or applicants for employment in federal agencies "shall be made free from any discrimination based on race, color, religion, sex, or national origin." The Court stated that although it was reluctant to hold that Congress had overridden by subsequent legislation long-existing statutes without specific reference to them, it had concluded that Congress had done so in this instance. Moreover, the fact that the 1972 Act applied to virtually the entire Federal Government, while the Indian Preference Statutes affected only the Bureau (and the Indian Health Service), was not "a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes." (App. B, p. 34). The Court further stated that no evidence had been introduced to show that being Indian was a job-related criterion, or that there was any national public purpose concerned in the Preference Policy as compared with the nondiscrimination statutes. (*Id.*) The Court did not refer to the extensive legislative history of the 1934 Preference Statute which defendants introduced to demonstrate the purpose of the statute.

The Court did not reach the question of the constitutionality of the Indian Preference Statutes. However, it stated that in the absence of evidence to indicate that an important governmental objective lay behind the statutes, "we could well hold that the statute must fail on constitutional grounds." (App. B, p. 35). Again, no mention was made of the extensive legislative history of the 1934 Act introduced by defendants.

The Government and Amerind both filed Notices of Appeal with this Court on June 29, 1973. On August 16, 1973, upon application by the Government, the Court (Marshall, J.), stayed the enforcement of the District Court's judgment pending disposition of the appeal.

The Questions Are Substantial

The outcome of this case is of extreme importance to the Indian people. It directly affects more than 8,000 Indian employees of the Bureau and nearly 4,000 Indian employees of the Indian Health Service. Indirectly it will determine the extent to which the many thousands of Indians living on reservations are to be permitted to govern their own affairs. Moreover, the rationale of the District Court, if upheld, may well invalidate statutes authorizing other benefits, such as financial assistance, designed to alleviate the plight of the Indians. The entire federal Indian program could be seriously set back unless the decision below is reversed.

It is ironic, to say the least, that the lower court's decision in this case, which has invalidated an important tool that can help the Indian people towards the Congressional goal of self-determination, should come at the time when the Federal Government has finally recognized its failure of responsibility to its wards.* In a recent message to Congress, President Nixon stated:

"It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people.

* Indeed, this lawsuit came about as a direct result of the broader reading of the Indian Preference Statutes by the Bureau that followed this recognition.

Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. *The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.*" (116 Cong. Rec. 23137, July 8, 1970, emphasis supplied.)

1. *In Passing the Equal Employment Opportunity Act of 1972, Congress Did Not Intend to Repeal the Indian Preference Statutes.*

The purpose of the 1934 Indian Preference Statute was described by Senator Wheeler, one of the sponsors of the bill, as being "to impose upon the Indians self government in their own affairs," and "to give the Indians the control of their own affairs and of their own property" (78 Cong. Rec. 11123, 11125 (73rd Cong., 2d Sess. 1934)). This and other legislative history of the Act makes clear that Congress, recognizing the unique status of the Bureau as the only federal agency whose purpose is to govern the affairs of one specific race of people, decided that it was only just to allow those people a say in their own government. Moreover, Congress wished to correct the situation in which "the Indian Bureau has been incompetent, oppressive, and too indifferent to the needs of the Indians." (Senator King, *Id.*, 11126). The earlier preference statutes having failed, Congress wanted to ensure that the Indian should be given "the mere privilege of getting a chance to do his own work in the employ of the Government," and to facilitate turnover of "the Indian Service to the Indians." *

* Testimony of John Collier, Commissioner for Indian Affairs, Hearings on H. R. 7902 before House Committee on Indian Affairs, 73rd Cong., 2d Sess., Pt. 1 at 38, 58 (1934).

(a) The Legislative History of the Civil Rights Acts Indicates That Congress Intended the Indian Preference Statutes to Remain in Force.

There is not one word in the legislative history of the 1972 Equal Employment Opportunity Act which suggests that Congress intended to repeal the Indian Preference Statutes. Moreover, the overall legislative history of this Act and of the Civil Rights Act of 1964 strongly suggests that in fact Congress intended these statutes to remain in force. The 1964 Act, *inter alia*, prohibited discrimination by private employers on grounds of race, color, religion, sex, or national origin. However, Section 703(i), 42 U.S.C. § 2000e-2(i) provides that the prohibition is not to apply

“to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.”

Senator Humphrey, who sponsored Section 703(i), explained that:

“This exemption is consistent with the *Federal Government's policy of encouraging Indian employment* and with the special legal position of Indians.” (110 Cong. Rec. 12721, June 4, 1964, emphasis supplied.)

In other words, Congress, recognizing the existing preference given to federally-employed Indians in the Bureau, wished to ensure that similar preference on the part of private employers would not be banned by the 1964 Act. It is inconceivable that in extending the general prohibition against discrimination in employment to the Federal Gov-

ernment in 1972, Congress could have intended to sweep away Indian Preference, when eight years earlier it had specifically recognized this policy and ensured that private employers would not be forbidden to give preference to Indians. To the contrary, it is far more likely that Congress intended the 1934 Statute to remain in effect as the counterpart to the 1964 provision.

The focus of the 1972 Equal Employment Opportunity Act itself suggests that Congress did not intend to repeal the Indian Preference Statutes. Not only is the 1972 Act a statute of general application, as opposed to the very specific Indian Preference Statutes (see below, Subsection (b)), but it appears that the prohibition on discrimination in employment imposed by the 1972 Act was only intended to cover positions in the competitive part of the Civil Service. Section 717(a), 42 U.S.C. § 2000e-2 covers not only federal military departments and executive agencies, but also "those units of the Government of the District of Columbia *having positions in the competitive service*, and . . . those units of the legislative and judicial branches of the Federal Government *having positions in the competitive service*." (Emphasis added.) This language itself suggests that Congress had in mind only Competitive Service positions in the federal agencies as well, and the House Report on the bill confirms that this indeed was Congress' intent. In its section-by-section analysis of the bill it stated with reference to Section 717(a):

"All personnel actions affecting employees or applicants for employment *in the competitive service of the United States* . . . shall be made free from any discrimination based on race, color, religion, sex or national origin."*

* House Report 92-238, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Congressional and Administrative News, Vol. 2, 2137, 2167.

But the Bureau is staffed substantially from outside the Competitive Service. The first sentence of the 1934 Statute, 25 U.S.C. § 472, authorized the appointment of Indians to the Indian Office "without regard to civil-service laws," and thus gave rise to the so-called "Excepted Service," whereby Indians are appointed to the Bureau outside the normal competitive civil service procedures. It is believed that most Indians join the Bureau through the Excepted Service, and although some transfer to the Competitive Service after entering the Bureau, at least half of the Indian employees now in the Bureau are in the Excepted Service.* It is quite unreasonable, therefore, to assume that Congress intended the 1972 Act to apply to the Bureau.

(b) In the Absence of Legislative History to the Contrary, General Legislation Does Not Repeal Earlier Specific Legislation.

Even if we ignore the legislative history of the Civil Rights Acts described above, it is clear that the District Court erred in holding that the Indian Preference Statutes were impliedly repealed by the 1972 Act. As we have noted, in passing the 1972 Equal Employment Opportunity Act Congress said not one word about intending to repeal the Indian Preference Statutes, and in these circumstances, "a specific statute controls over a general one 'without regard to priority of enactment.'" *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). We cannot understand the District Court's conclusion that this case does not involve a conflict between special and general legislation. The 1972 Act covers virtually the entire Federal Government; the Indian Preference Statutes affect only a few thousand employees in two agencies. Moreover, the Bureau occupies a

* Testimony of Raymond Gunter, Tr. 90-91.

unique position in the Federal Government. As Senator Wheeler, one of the sponsors of the 1934 Indian Preference Statute, stated during the hearings on the bill, "it is an entirely different service from anything else in the United States, because these Indians own [their own] property."* As discussed in Section 2 below, the Indian occupies a unique position in the constitutional and legal structure of the United States.

This Court has previously held that general legislation did not override earlier legislation specifically applicable to Indians. The question in *Squire v. Capoman*, 351 U.S. 1 (1956), was whether the sale of timber on land allotted to Indians under the General Allotment Act of 1887 was subject to taxation under the Internal Revenue Code of 1939. The Government argued that the Code contained no exemption for tax in this situation. The Court concluded, however, that in passing the General Allotment Act and an amendment thereto, Congress had exempted such sales tax, and that:

"It is unreasonable to infer that, in enacting the income tax law, Congress intended to undermine the Government's undertaking. To tax respondent under these circumstances would . . . be 'at the least, a sorry breach of faith with these Indians.'" 351 U.S. at 10.

We submit that in the absence of a shred of evidence that Congress in 1972 intended to repeal the Indian Preference Statutes, it would be an equally sorry breach of faith with the Indian people to hold that these statutes had been impliedly overruled by the Equal Employment Opportunity Act.

* Hearings on S. 2755 and S. 3645 before Senate Committee on Indian Affairs, 73rd Cong., 2d Sess. (1934) at 256.

2. *The Unique Legal Status of the Indian, and the Strong Government Purpose Underlying the Indian Preference Statutes, Override Any Possible Constitutional Objections.*

As we have noted, the District Court did not reach the constitutional question raised by plaintiffs, although it intimated that in the absence of evidence as to an important governmental objective it might have held that the statute must fail on constitutional grounds (App. B, p. 35). In the event that this Court agrees with our contention that the Indian Preference Statutes have not been repealed by Congress, the constitutional question will be squarely raised. The Court may wish to consider the question on this appeal. As we now show, we believe that despite the District Court's conclusion, there was sufficient material in the record below to demonstrate that in passing the Indian Preference Statutes Congress had a valid and important purpose which overrides any possible constitutional objections.

As Senator Wheeler, one of the sponsors of the 1934 Act, noted, the Bureau "is an entirely different service from anything else in the United States, because these Indians own their own property." * The essential purpose of the statute, as clearly appears from the legislative history (which was before the District Court), was gradually to turn over the operation of the Bureau, which governs the affairs of Indians, to the governed. Congress was concerned that:

"The civil service as applied to the Indians has built up an inefficient and incompetent bureaucracy, under

* Hearings on S. 2755 and S. 3645 before Senate Committee on Indian Affairs, 73rd Cong. 2d Sess. (1934), at 256.

which the progress of the Indians has been interfered with and the individual, economic, and moral development has been impeded." *

The preference applied only to the "Indian Office," which now consists of the Bureau of Indian Affairs and the Indian Health Service. The preference does not even apply to all Indians, since members of tribes who have severed their relationship with the Federal Government do not receive the preference.** The Bureau's work deals "predominantly" with reservation Indians, who own the land on which they live.*** Congress believed that it was only just, after many years of mismanagement and abuse of the Indian people, that the Indian should be given an opportunity to manage his own affairs. This, we submit, is an overwhelming governmental purpose which overrides any possible constitutional objection.

It has long been recognized that the Indian occupies a unique position in the constitutional and legal framework of this country. An entire chapter of the United States Code is devoted to laws which apply exclusively to Indians.†

* Senator King, 78 Cong. Sec. 11127 (73rd Cong. 2d Sess. (1934)).

** Testimony of Raymond Gunter, Tr. 99.

*** *Id.*, 93. In effect, therefore, the preference is not so much based upon race, but upon land ownership. We do not believe that the Constitution would bar a municipal ordinance giving preference in employment in municipal government to residents of the municipality.

† This legislation covers, among other matters, education (25 U.S.C. § 13), health (25 U.S.C. § 231), civil liberties (25 U.S.C. §§ 1301-03), welfare (25 U.S.C. §§ 305-09(a)), transfers of land (25 U.S.C. §§ 348, 391, 393), validity of contracts (25 U.S.C. §§ 81, 82(a), 84), testamentary disposition (25 U.S.C. §§ 371-80), and expenditures of tribal funds (25 U.S.C. § 122).

"[T]he relation of the Indians to United States is marked by peculiar and cardinal distinctions which exist nowhere else. . . ." *The Cherokee Nation v. Georgia*, 5 Pet. 1, 16. See also *United States v. Kagama*, 118 U.S. 375, 381 (1886); *Scott v. Sanford*, 60 U.S. 393, 403-04 (1856).

In recognition of this unique status, the courts have held that Indians may be accorded special preferential treatment consistently with the United States Constitution. In 1943 the Supreme Court upheld the constitutionality of federal statutes which exempted from Oklahoma Real Estate taxes certain lands held by Indians. *Board of County Commissioners v. Seber*, 318 U.S. 704 (1943). And in 1965, the Supreme Court affirmed a decision of a three-judge district court upholding the constitutionality of a statute restricting inheritance of certain property to enrolled members of Yakima tribes of one-fourth blood or more. *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd*, p.c. 384 U.S. 209 (1966). The lower court in *Simmons* stated:

" . . . it seems obvious that whenever Congress deals with Indians . . . it must necessarily do so by reference to Indian blood . . .

"Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of a 'criterion of race.' *Indians can only be defined by their race.*

" . . . Congress in legislation has not hesitated to place full-blood Indians in one class and all others in another, giving one class more rights than the other." (244 F. Supp. at 814-15, emphasis supplied.)

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CONCLUSION

The Court below, we submit, erred on an issue of great public importance. Its decision, if affirmed, will block implementation of a policy laid down by Congress on four different occasions, beginning in 1834, and designed to allow the Indian a measure of self-determination. We request that this Court note probable jurisdiction, so that it may give plenary consideration to the important questions raised by this case.

Respectfully submitted,

STUART J. LAND
1229—19th Street, N.W.
Washington, D.C. 20036

HARRIS D. SHERMAN
1130 Capitol Life Center
Denver, Colorado 80203

*Attorneys for Intervenor-
Appellant Amerind*

Of Counsel:

PATRICK F. J. MACROBY
1229—19th Street, N.W.
Washington, D.C. 20036

Dated: January 29, 1974.

APPENDIX A

**Order of District Court Dated November 20, 1972,
Granting Motion of Amerind to Intervene
as Defendant**

**IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
No: 9626 Civil**

MANCARI et al.,

Plaintiffs,

—v.—

ROGER C. B. MORTON, as Secretary of the Interior, et al.,

Defendants,

AMERIND,

Applicant for Intervention.

THIS MATTER coming on to be heard on this 20th day of November, 1972, upon the Motion of the Applicant for Intervention requesting that Amerind be permitted to intervene as a party in this action, the Court having considered this Motion and being fully advised in the premises,

IT IS ORDERED:

That Amerind be permitted to intervene as a party in this case.

Done in Open Court this 20th day of November, 1972
this Order is entered upon the oral concurrence of all
Members of the Court.

By the Court:

/s/ HOWARD BRATTON

Judge

APPENDIX B

**The Opinion and Judgment of District Court,
June 1, 1973**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

No. 9626 Civil.

**C. R. MANCARI, ANTHONY FRANCO, WILBERT GAR-
RETT and JULES COOPER, on behalf of themselves
and all others similarly situated, PLAINTIFFS**

v.

**ROGERS C. B. MORTON, as
Secretary of the Interior, et al., DEFENDANTS**

MEMORANDUM OPINION

Filed at Albuquerque, June 1, 1973

This is a class action brought by the named plaintiffs on behalf of themselves and all other employees of the Bureau of Indian Affairs who are of less than twenty-five per cent Indian blood. Plaintiffs seek to enjoin the defendants from implementing and enforcing a policy of the Bureau of Indian Affairs to give preference to persons of one-quarter or more Indian blood in initial hiring, training, promotion, and reinstatement.

Plaintiffs allege that Title 25, United States Code, §§ 44-46 and 472 (hereinafter the Indian Preference Statutes), are being improperly construed by the Secretary and the Commissioner in that these sections were meant to extend a preference to Indians in initial hiring only. Plaintiffs further allege that this expanded policy violates their rights under the Civil Rights Acts of 1964 and 1972, which rights are

guaranteed them in Title 42, United States Code, §§ 2000e et seq., and Public Law 92-261, § 717. Finally plaintiffs allege that the Indian Preference Statutes are unconstitutional because they deprive plaintiffs of their rights to property without due process of law in violation of the Fifth Amendment to the United States Constitution.

The non-Indian plaintiffs are longtime employees of the BIA. They are teachers at the Albuquerque Polytechnic Institute, or programmers, or in computer work, or teachers in other areas. They testified as to particular training or advancements for which they had applied, and which in their opinion were denied by reason of the application of the preference policy. We find that the plaintiffs demonstrated sufficient connection with the application of the policy to bring this action for themselves and others similarly situated.

The defendants are persons occupying official positions relating to the BIA and are responsible for the application of the Acts herein concerned.

We find that there are asserted substantial constitutional questions requiring consideration by a three-judge court

The United States Attorney, who appears for the defendants, challenges the court's jurisdiction over the subject matter. The Court of Appeals in *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir.), held that there was jurisdiction under 5 U.S.C. § 704 in that action. Here the plaintiffs assert jurisdiction under 42 U.S.C. § 2000e and 28 U.S.C. § 1346(a)(2). This could be considered under the latter statute since the action was against "Rogers C. B. Morton, as Secretary of the Interior," and against other named persons in their official capacities. As indicated, the United States Attorney has

appeared as counsel for the defendants. However, we hold that there is jurisdiction under 42 U.S.C. § 2000 e, and any further challenge before the Department concerned would be an idle gesture in the face of the issuance of the policy statement and its implementation by regulations and orders. The issue is not an interpretation of policy statements or their application, but is a direct challenge to the validity of the statute on which the departmental policy is based. There is thus no purpose shown why any further administrative action would serve any useful purpose. *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir.), we believe, is significant on this point although it dealt with 5 U.S.C. § 704 where no administrative machinery was expressly provided.

Defendants contend that they are directed by 25 U.S.C. § 472 to implement the policy of Indian preference. Section 472 provides as follows:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Other statutory provisions relating to preference, although less explicit, appear at 25 U.S.C. §§ 44 and 46.

The gist of the preference policy which precipitated the challenge was embodied in Personnel Management Letter No. 72-12, issued by the Albuquerque Area Office of the BIA, which provided in part as follows:

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian preference to training and filling vacancies by original appointment, reinstatement and promotions. . . .

"The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. . . ."

The policy was officially announced and, as we find from the evidence that it is being carried out, applies the preference in hiring and promotions. Instances of promotional preferences were testified to by the witnesses. The policy is thus a reality, and far beyond the formative stage.

A preliminary issue relates to the validity of 25 U.S.C. § 472, quoted above, in view of its inclusion in the heterogeneous Indian Reorganization Act of 1934. This provision was included in the Reorganization Act together with other sections which relate to a variety of subjects. In one of the sections, now 25 U.S.C. § 478, provision is made for submission of "the Act" for acceptance or rejection by the various Indian tribes. This voting section (478) on its face would appear to make the application of section 472, with which we are here concerned, optional with individual tribes by requiring a special election of the adult members of the tribe to vote on the application of the entire Act.

The Reorganization Act was submitted and voted on and was rejected by a considerable number of

tribes. This rejection and acceptance tribe by tribe creates some uncertainty, but a careful reading of the other sections, as well as a review of the Congressional history of the Act, convinces us that the elections were to be only for the purpose of accepting or rejecting sections 476 and 477 of Title 25, 48 Stat. 987-88. For example, we cannot believe that Congress intended all the Indian tribes to vote on the extension of boundaries of the Papago Reservation (section 463a, 50 Stat. 536), on the Secretary making rules and regulations for the operation and management of Indian forestry units (section 466, 48 Stat. 986), or on appropriations for vocational and trade schools (section 471, 48 Stat. 985), or on other provisions found in the Indian Reorganization Act. It is difficult to see how under any other construction the Act would be valid.

Senator Wheeler, one of the sponsors of the Reorganization Act, made the following remarks in his discussion of sections 476 and 477 of the Act:

"The third purpose of the bill is to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations. This provision will apply only if a majority of the Indians on any Indian reservation desire this sort of organization. As a matter of fact, however, it does not change to any great extent the present tribal organization, except that when a majority of the Indians want to establish this tribal organization and extend the provisions of the bill to it, they may do so." (1934 Congressional Record, p. 11123).

Nothing which followed in the debate or in the way of amendments suggests to us that the option of acceptance was extended to any other portion of the Act, and therefore the preference section here concerned must be held to extend to all Indians as individuals.

The issue of the proper construction of 25 U.S.C. § 472 is urged on this appeal and is a significant problem. The United States Court of Appeals for the Tenth Circuit in *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956, considered the application of the preference statutes to reductions in the work force of the Bureau of Indian Affairs, and held the preference not applicable. There section 472 was considered, as were sections 44 and 46 of 25 U.S.C., and references were made to the legislative history. The parties and the court were there concerned only with the particular issue at hand. There was no other issue nor a general challenge to the Act. The preference thus does not apply to reductions in the work force.

The United States District Court for the District of Columbia, in *Freeman v. Morton*, Civ. No. 327-71 (not yet reported), had before it the question of whether or not section 472 gave the plaintiff a preference over all non-Indian employees in the Bureau of Indian Affairs with respect to promotions, reassignments to vacant positions within the BIA, and to assignments to available training positions (the contrary position was that the preference was only as to initial hiring). The district court in *Freeman* held that section 472 required the preference be given in promotions and reassignments to vacant positions within the Bureau, but that it did not extend to positions in training programs.

We do not decide whether the preference is as broad as the court in *Freeman v. Morton* indicates. It is sufficient to permit consideration of the basic issue to observe that no one challenges the application of the preference acts to initial hiring and indeed the wording does not permit such a challenge.

We turn now to the asserted conflict between the Indian Preference statute and the Civil Rights Acts of 1964 and 1972 (Equal Employment Opportunity Act, 1972, Public Law 92-261). As indicated above plaintiffs assert that the Indian Preference Policy adopted and implemented by the Bureau is in direct conflict with the Civil Rights Act of 1964 and 1972, and more specifically with Title 42, United States Code, § 2000e-2 and as amended by Public Law 92-261. Plaintiffs in their challenge to the preference acts thus assert that the Bureau, by refusing to obey the Congressional mandate set forth in section 717 of Public Law 92-261, is violating the rights given them under that added section.

Section 717 provides in part as follows:

"Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units

of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

On its face, section 717 applies to all agencies of the federal government. There is nothing in the Committee Report or in House Report No. 92-238, accompanying H. R. 1746, enacted into law as Public Law 92-261, which would indicate that the Bureau of Indian Affairs be excepted from its provisions (see 1972 U.S. Code Cong. & Ad. News, pp. 2137, 2157). Exceptions are contained in the Act, but none as to the Indians or the Bureau.

Senator Byrd of West Virginia, speaking in favor of the bill, made the following remarks:

"I do not favor special treatment or special consideration or favored employment of any individual on the basis of that person's being black or white, male or female. . . . Notwithstanding what I have just said, the fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States. . . .

"In other words, he should rise or fall on the basis of merit, not on the basis of race or religion or sex. Every qualified individual—black, white or else—should be given an equal chance—not preferential treatment—at employment." (Congressional Record, January 26, 1972, at s. 590).

And Senator Humphrey, speaking for the bill, made the following statement:

"We must make absolutely clear the obligation of the Federal Government to make all personnel actions free from discrimination based on race, color, sex, religion, or national origin." (Congressional Record, January 20, 1972, at ss. 172-173).

The United States Supreme Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424, at 430-31, held as to Title VII:

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

The Eighth Circuit has also held that Title VII forbids reverse discrimination. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.). See also *Jackson v. Poston*, No. 18296, New York Sup. Ct.

Should section 717 of Public Law 92-261 take precedence over the Indian Preference Statutes? Although we are reluctant to hold that Congress has overridden by subsequent legislation long existing statutes without specific reference to them, we must conclude that this was done in this instance.

The Equal Employment Opportunity Act of 1972 is a clear, emphatic directive by Congress that all positions in the competitive civil service of the federal government should be filled without regard to race, religion, sex, color, or national origin. It is subject to no other interpretation, and as indicated, there were exceptions placed in it, so Congress considered limitations on its scope, but none was included as to the Bureau of Indian Affairs. Thus the several preference statutes were overridden, and the Bureau must conform to the broad sweep of section 717.

This is not a simple instance of a relationship of a general statute to a special subject statute which often occurs. Each statute purports to cover the same particular subject of personnel actions relating to, as section 717 described them, "... discrimination based on race, color, religion, sex, or national origin." One Act applies to all but some excepted bureaus or agencies and the other to the "Indian Office." This is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes. Further by the nature of the subject matter and scope, the two cannot exist side by side. See *Posadas v. National City Bank*, 296 U.S. 497.

There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion. *Griggs v. Duke Power Co.*, 401 U.S. 424. There was no evidence whatever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

We do not consider that Board of County Comm'rs v. Seber, 318 U.S. 705, or Simmons v. Eagle Seelatsee, 384 U.S. 209, led to a contrary conclusion. It is apparent that Indian tribes have been the subject of particular legislation from time to time. But this of itself is no reason for a different treatment of Indians generally. Indians as such are not considered to have rights, so far as here pertinent, different from other citizens; they are citizens and are obviously entitled to all rights, privileges, and burdens thereof.

We have not considered the challenge by plaintiffs to the constitutionality of the preference statutes. This issue involves the consideration of the reasonable governmental purpose or objective sought to be attained in creating the preferred position for certain persons having a stated percentage of Indian blood as compared to others. There was testimony as to the manner in which certain non-Indians were affected by the policy. The separate treatment was thereby established together with its impact on the individuals. The defendants had the burden of coming forward with evidence of an important governmental objective but put on no evidence directed to this matter. Under these circumstances, we could well hold that the statute must fail on constitutional grounds, but instead we hold as above described that the preference statutes must give way to the Civil Rights Acts.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard Bratton
United States District Judge

/s/ E. L. Meechem
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 9626 Civil

C. R. MANCARI, *et al.*, PLAINTIFFS

v.

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*

[Filed at Albuquerque, Jun. 1, 1973]

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that the named defendants are hereby permanently enjoined from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian, since 25 U.S.C. §§ 44, 46 and 472 are contrary to the Civil Rights Act, and are inoperative.

IT IS SO ORDERED.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard Bratton
United States District Judge

/s/ E. L. Meechem
United States District Judge

APPENDIX C

Notices of Appeal by Amerind and
the Government

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
No. 9626 Civil

C. R. MANCARI, ANTHONY FRANCO, WILBERT GARRETT and
JULES COOPER, on behalf of themselves and all others
similarly situated,

Plaintiffs-Appellees,

—v.—

ROGERS C. B. MORTON, as Secretary of the Interior, LOUIS
R. BRUCE, as Commissioner of Indian Affairs, WALTER
O. OLSON, as Area Director, Bureau of Indian Affairs,
Albuquerque Area Office, and ANTHONY LINCOLN, as
Area Director, Bureau of Indian Affairs, Navajo Area
Office,

Defendants-Appellants,

—v.—

AMERIND,

Intervenor-Appellant.

Pursuant to Rules 10 and 11, Supreme Court of the
United States, the above-named Appellant, Amerind, hereby

appeals to the United States Supreme Court from the final order of the United States District Court for the District of New Mexico, granting Appellees' Complaint for injunctive relief, entered in this action on June 1, 1973.

This notice of appeal, filed this 29th day of June, 1973, is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

HARRIS D. SHERMAN

Attorney for Intervenor-Appellant Amerind

1130 Capitol Life Center

Denver, Colorado 80203, (303) 892-6022

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
No. 9626 Civil

C. R. MANCARI, *et al.*,

Plaintiffs,

—VS.—

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*

[Original Filed Jun. 29, 1973]

NOTICE OF APPEAL

NOTICE is hereby given that the defendants Rogers C. B. Morton, as Secretary of the Interior, Louis R. Bruce, as Commissioner of Indian Affairs, Walter O. Olson, as Area Director, Bureau of Indian Affairs, Albuquerque Area Office, and Anthony Lincoln, as Area Director, Bureau of Indian Affairs, Navajo Area Office, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on June 1, 1973. This appeal is taken pursuant to the provisions of 28 U.S.C., Section 1253.

/s/ Victor R. Ortega

VICTOR R. ORTEGA

United States Attorney

Post Office Box 607

Albuquerque, New Mexico 87102

Attorney for Defendants

APPENDIX D

**Opinion of the District Court for the District of
Columbia in *Enola Freeman, et al. v. Rogers
C. B. Morton, et al.*, Civ. No. 327-71
(December 21, 1971)**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 327-71**

ENOLA E. FREEMAN on behalf of herself, and all others
similarly situated, *et al.*,

Plaintiffs,

—v.—

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*,

Defendants.

OPINION AND ORDER

The plaintiff, a person of at least one quarter Indian blood,¹ suing on her own behalf and on behalf of all other Indian employees of the Bureau of Indian Affairs (hereinafter the "BIA"), asks for summary judgment on her request for declaratory relief against the defendant,

¹ This satisfies the BIA's definition of a member of the Indian race. 44 Bureau of Indian Affairs Manual 713, 1.2.

Rogers Morton, Secretary of the Interior, and all others with responsibility for administering the BIA.²

Specifically, she asks that a portion of the Indian Reorganization Act of 1934—25 U.S.C. Sec. 472—be declared to vest the plaintiff, by virtue of her status as an Indian employee of the Bureau of Indian Affairs, with preference over all non-Indian employees in respect to:

- (a)) promotions,
- (b)) reassignments to vacant positions within the BIA; and
- (c)) assignments to available training programs

The defendant has made a cross-motion for summary judgment and seeks a declaration that Section 472 is mandatory only in the area of initial hiring.³

Section 472 reads as follows:

Standards for Indians Appointed to Indian Office

The Secretary of Interior is directed to establish standards of health, age, character, experience, knowledge and ability for Indians who may be appointed, without regard to civil service laws, to the various positions

² The government challenges the standing of the plaintiff to sue. Without belaboring the point, this Court finds that she does have the requisite standing as an Indian employee of the BIA to seek declaratory relief of the nature sought.

³ Since neither party has raised the constitutional questions that such racially discriminatory legislation brings to mind, the Court will not treat them. Certainly not all classifications based on race are invalid. *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971); and Congress has broad powers to "... do all that [is] required ... to prepare the Indians to take their place as independent, qualified members of the modern body politic." *Board of County Commissioners v. Seber*, 318 U.S. 705 (1943). These Indian preference statutes appear to be a rational exercise of that power.

maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian Tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions. (emphasis added) June 18, 1934, c. 576 Sec. 12, 48 Stat. 986.

A. Promotions

The plaintiff contends that the language italicized above is mandatory in its thrust and that a preference must be accorded all Indians whenever a vacancy is to be filled. She suggests that a vacancy occurs whenever and however there is an opening to be filled within the BIA, and the fact that the vacancy may be of such a nature that it should or may be filled by promotion or otherwise within the BIA is immaterial. Upon the occurrence of a vacancy, the defendant must provide an opportunity for the submission of applications for it and any "qualified" Indian applicants must be given preference over non-Indian applicants. Plaintiff defines "preference" to mean that a minimally qualified Indian *must* be hired even though there may be available a more capable, better qualified non-Indian applicant for the position.

The defendant does not quarrel with plaintiff's concept or preference; but, relying upon *dicta* in *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir. 1970),⁴ argues that

⁴ While the Tenth Circuit decision in *Mescalero* was limited to the question of whether Indian preference should be extended to reduction in force (a question which lies beyond the scope of this discussion), there is *dicta* which suggests that "... it may be necessary to employ non-Indians whenever it is not 'practicable' to do otherwise." In light of the clear language of Sec. 472 this Court concludes that the Tenth Circuit did not intend the term "practicable" to embrace any situation other than the absence of qualified Indian applicants. In any case, the quoted language was mere *dicta* and not essential to the Court's holding.

the mandatory use of the preference applies only to initial hiring.

The defendant further argues that it has adopted in "99% of all promotion cases" the policy the plaintiff asserts is made mandatory by Sec. 472, but that there should be implied administrative discretion in the implementation of the preference policy so that in an emergency or other crisis the Secretary may be permitted to use other criteria in promotion decisions. In any case, he argues, this is a rational interpretation and application of the Congressional mandate and should not be disturbed. *Udall v. Tallman*, 380 U.S. 1 (1965).

The Court finds that the statutory language cannot be read to sustain either of the defendant's contentions. As to the assertion that "vacancy" applies only to initial hiring there is nothing either in the statute itself or its legislative history to support such a claim. A "vacancy" is a "vacancy" no matter how created. Congress drew no distinctions—as it could easily have done had it so intended.⁵

And, as to the assertion that there must be administrative discretion in the implementation of the preference

⁵ One need only look at various Indian preference statutes to recognize that Congress was well aware of the distinction between discretionary and mandatory action.

For example, Congress enacted a preference statute in 1934 giving preference to Indians for positions as interpreters "... if such can be found." 25 U.S.C. Sec. 45, 4 Stat. 737. In 1882 preference was extended to clerical, mechanical or other help on the Indian reservations "... as far as practicable." 25 U.S.C. Sec. 46, 22 Stat. 88. In 1884 Congress instructed the Secretary of the Interior to see that Indians were to be employed as teamsters, herders and laborers and "where practicable in all other employments in connection with the agencies and the Indian service." 25 U.S.C. Sec. 44, 28 Stat. 313. (emphasis supplied)

In light of this past statutory language the Court concludes that if Congress had intended to write discretionary power into the language of Sec. 472 it would have done so expressly.

policy, again we must turn to the statute. It does not say the "Indians . . . *may* have preference." It says: ". . . qualified Indians shall hereafter have . . . preference." And this Court so holds. If such a mandate makes the administrative position of the defendant difficult, it is to Congress that the defendant must turn for relief, not the courts. The mandate of the legislature cannot be construed away for the sake of convenience.

B. Reassignments and "Lateral Transfers"

This aspect of the controversy concerns those situations where a vacancy occurs somewhere in the BIA and, by pre-arrangement or otherwise, is filled "laterally" by an employee without any attendant change in that employee's status viz-a-viz the overall BIA personnel picture. For example: an employee clerk-typist grade GS-6 in Office A retires or leaves, and a second employee, GS-6 clerk-typist is laterally transferred from Office B to the vacancy in Office A created by the severed employee.

The defendant argues that the net effect of such a situation is to create only *one* vacancy. In filling that vacancy, he argues, the preference should apply, but only as to that vacancy. The plaintiff's argument suggests that two "vacancies" are created—one in Office A when the first employee resigns or retires and another in Office B when the second employee is transferred—and that the preference statute applies to both.

Again the Court must agree with the plaintiff. While it is obvious that this strict interpretation of Section 472 will leave the non-Indian employees of the BIA in a relatively frozen position and will undoubtedly dim their promotional prospects within the agency, the Court cannot

say that such a result lies outside the intent of Congress. The legislative history of the Indian Reorganization Act of 1934 reveals that the Congressional intent was that the BIA become an agency staffed with Indians performing services for Indians. While the "present employees" of the agency were not to be dismissed from their jobs because of the preference, it goes without saying that a choice was made between their future prospects and the Congressional purpose that the BIA became an "Indian" agency in the sense that it was to be staffed by Indians wherever possible. 78 Cong. Rec. 11729-31.

The Court appreciates the complexity of the problems administrative personnel may face in implementing this interpretation of Section 472, but as stated above, this difficulty, if it arises, should be resolved by the legislature not this Court.

C. Assignment to Training Programs

In this instance the plaintiff argues that since the preference required by Section 472 is limited to "qualified Indians," it is implicit that preference must also be afforded Indians in obtaining access to training programs so that they may presumably become more "qualified" to fill any vacancy that occurs.

The Court does not agree. The standards set by the statute refer only to "positions" *maintained* by the BIA. The Court finds that training programs clearly are not maintained positions within the meaning of the statutory language, and that vacancies in such programs need not necessarily be filled with reference to the Indian preference statutes.

Plaintiff's counsel argues that there is an "implication" inherent in 25 U.S.C. 472 that Congress intended that

preferential treatment be afforded Indians in the area of job-related training programs as well as in promotions and hiring.

However, the legislative history cited to support this contention is drawn from the debate and hearings concerning the entire Indian Reorganization Act of 1934 of which 25 U.S.C. 472 was but a part. In fact, Section 11 of that Act (now 25 U.S.C. 471) provided for an appropriation of \$250,000 annually for Indian training and educational scholarships, and it was *this* section to which the Congressional remarks concerning the entire Indian Reorganization Act were directed, not the section providing for Indian preference in filling vacancies. 78 Cong. Rec. 11123, 11729-11731. Undoubtedly Congress intended to train Indians to fulfill the new responsibilities being made available to them; but it was through the allocation of additional funds, not the application of the preference statute that this intention was to be executed.

* Since there is no evidence of Congressional intention to extend the principle of Indian preference to training opportunities within the BIA, the Court will not imply one—just as it would not imply a limitation on the definition of the word “vacancy” *supra*.*

It is accordingly ORDERED this 21st day of December, 1972, that all initial hirings, promotions, lateral transfers

* Such an implication would fly in the face of subsequent legislation. Under the authority of the Training Act of 1958 the Civil Service Commission has promulgated certain regulations, Section 410.302(c) of which requires that each agency see that selection of employees for training be made “without regard to race, color, religion, sex, national origin . . .” While certain government agencies were exempted from the coverage of these regulations (The Foreign Service, Tennessee Valley Authority, Central Intelligence Agency), 5 U.S.C. §4102, the BIA was not.

and reassignments in the Bureau of Indian Affairs as well as any other personnel movement therein intended to fill vacancies in that agency, however created, be declared governed by 25 U.S.C. Sec. 472 which requires that preference be afforded qualified Indian candidates; and it is further

ORDERED that the plaintiff's motion for a declaration that the filling of vacancies in training programs administered by the BIA is also governed by the same preference statute be denied.

HOWARD F. CORCORAN
Judge

MAR 8 1974

IN THE
Supreme Court of the United States

October Term, 1973

No. 73-362

No. 73-364

Supreme Court, U.S.
FILED

MAR 18 1974

ROGERS C. B. MORTON, MICHAEL RODAK, JR., CLERK
Secretary of the Interior, *et al.*,

Appellants,

and

AMERIND,

Intervenor-Appellant,

vs.

C. R. MANCARI, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

**MOTION FOR LEAVE TO FILE BRIEF AMICI
CURIAE AND BRIEF AMICI CURIAE**

THEODORE S. HOPE, JR.
30 Rockefeller Plaza
New York, New York 10020

DONOVAN LEISURE NEWTON & IRVINE
WILLIAM C. PELSTER
JOSEPH E. FORTENBERRY

Of Counsel

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*,
Appellants,
and

AMERIND,
Intervenor-Appellant,
vs.

C. R. MANCARI, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE**

The Montana Inter-Tribal Policy Board, the National Congress of American Indians and the National Tribal Chairmen's Association hereby respectfully move for leave to file the attached brief *amici curiae*. Counsel for appellants and for intervenor-appellant have consented to the filing of this brief, but counsel for appellees have declined to consent.

The Interest of *Amici Curiae*

The Montana Inter-Tribal Policy Board is a non-profit corporation representing the Indians living in the State of Montana. About 20,000 Indians live on or near the seven Montana Indian reservations which contain members of the following Indian Tribes: Assiniboiné, Blackfeet, Chippewa-Cree, Crow, Salish and Kootenai, Gros Ventre, Northern Cheyenne, and Sioux. Also, about 1500 "Landless Indians," primarily Metis, live in and around Great Falls. The purpose of the Inter-Tribal Policy Board is to develop programs "for the socio-economic advancement of Montana Indian residents."

National Congress of American Indians, Inc. is a non-profit association of ninety Indian tribes and numerous individuals. Its purpose is to promote the interests of American Indians. It was incorporated in Oklahoma in 1954 and its national headquarters is in Washington, D. C.

The National Tribal Chairmen's Association is a non-profit organization of all duly constituted chairmen, presidents, governors and chiefs of federally recognized Indian tribes, and the presidents of twelve Alaskan groups created by the Alaskan Indian Claims Settlement Act.

The court below held that the Indian Preference statutes, which require the Bureau of Indian Affairs to give preference to Indians in hirings, appointments to vacancies, promotions and reassignments within the Bureau, had been impliedly repealed by the Equal Employment Opportunity Act of 1972, and enjoined the Secretary of the Interior and the Bureau of Indian Affairs from implementing and enforcing a hiring policy consistent with the Indian Preference statutes. The *per curiam* decision is reported as *Mancari v. Morton*, 359 F. Supp. 585 (D. N. M. 1973).

The Montana Inter-Tribal Policy Board, the National Congress of American Indians and the National Tribal Chairmen's Association believe that the District Court erred in ignoring the long history of Indian Preference statutes and the special congressional responsibility for Indians. Instead, the court concluded that the preference statutes were repealed simply because "[t]here is nothing in the Committee Report or in House Report No. 92-238 [on the Equal Employment Opportunity Act], which would indicate that the Bureau of Indian Affairs be excepted from its provisions." 359 F. Supp. at 589.

This lawsuit, which raises an issue of vital importance to all American Indians, is essentially between non-Indians and the federal government. The Montana Inter-Tribal Policy Board, the National Congress of American Indians and the National Tribal Chairmen's Association request permission to file the attached brief *amici curiae* in support of appellants and intervenor-appellant herein.

Respectfully submitted,

THEODORE S. HOPE, JR.
30 Rockefeller Plaza
New York, New York 10020
Attorney for Amici Curiae

DONOVAN LEISURE NEWTON & IRVINE
WILLIAM C. PELSTER
JOSEPH E. FORTENBERRY

Of Counsel

Dated: New York, New York
March 8, 1974

To: All Counsel for Appellants, Appellees,
and Intervenor-Appellant.

IN THE
Supreme Court of the United States
October Term, 1973

No. 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*,
Appellants,
and

AMERIND,
Intervenor-Appellant,
vs.

C. R. MANCARI, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

**BRIEF OF MONTANA INTER-TRIBAL POLICY
BOARD, NATIONAL CONGRESS OF AMERICAN
INDIANS, AND NATIONAL TRIBAL CHAIRMEN'S
ASSOCIATION, AS AMICI CURIAE**

THEODORE S. HOPE, JR.
30 Rockefeller Plaza
New York, New York 10020

DONOVAN LEISURE NEWTON & IRVINE
WILLIAM C. PELSTER
JOSEPH E. FORTENBERRY

Of Counsel

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*,

Appellants,

and

AMERIND,

Intervenor-Appellant,

vs.

C. R. MANCARI, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICI CURIAE

Interest of Amici Curiae

The interest of the *amici curiae* is set forth in the motion to which this brief is appended.

Statement of the Case

This action was brought by appellees, four non-Indian employees of the Bureau of Indian Affairs ("the BIA"), on behalf of themselves and all other non-Indian employees of the BIA. The action sought to enjoin the BIA and the Secretary of the Interior from implementing and enforcing those laws giving preference to qualified Indians in initial hiring, training, promotion, and reinstatement for positions in the BIA.¹ Appellees argued that the laws were being interpreted too broadly in that they should apply to initial hiring only; that enforcement of the laws violated their rights under the Civil Rights Act of 1964,² as amended by the Equal Employment Opportunity Act of 1972;³ and finally, that the Indian Preference statutes are unconstitutional because they deprive non-Indians of their rights to property without due process of law in violation of the Fifth Amendment to the United States Constitution.

The judgment of the District Court for the District of New Mexico was entered on June 1, 1973. In a memorandum opinion the court held that the Indian Preference statutes had been impliedly repealed by the Equal Employment Opportunity Act of 1972. *Mancari v. Morton*, 359 F. Supp. 585 (D. N. M. 1973). Ignoring the long history of the Indian Preference statutes and specifically rejecting the special responsibility of Congress towards the Indian tribes pursuant to the constitutional mandate of Article I, Section 8,⁴ the court below concluded:

¹ 25 U. S. C. §§ 44, 45, 46 and 472 [hereinafter sometimes referred to as "the Indian Preference statutes"].

² 42 U. S. C. §§ 2000e, *et seq.*

³ P. L. 92-261, 86 STAT. 103 (1972).

⁴ 359 F. Supp. at 591.

On its face, [the Equal Employment Opportunity Act] applies to all agencies of the federal government. There is nothing in the Committee Report or in House Report No. 92-238 [on the Equal Employment Opportunity Act], which would indicate that the Bureau of Indian Affairs be excepted from its provisions. (359 F. Supp. at 589)

The purpose of this brief *amici curiae* is to demonstrate that the district court's decision is contrary to well established principles of statutory construction, and that there are long-standing, legitimate and constitutional reasons for a congressional grant of preference to Indians for positions within the BIA which are not inconsistent with the purposes of the Equal Employment Opportunity Act.

Summary of Argument

If the court below had looked beyond the mere language of Indian Preference statutes and the Equal Employment Opportunity Act, it would not have concluded that the former were impliedly repealed by the more recent legislation. The Indian Preference statutes are not intended to discriminate on the basis of race, but rather to implement a long-standing congressional policy of encouraging the participation of Indians in the government of their own affairs. This congressional policy is fully within Congress' constitutional authority to regulate the affairs of the Indian tribes.

Argument

The court below disregarded a basic principle of statutory construction in reaching the conclusion that Congress has repealed the Indian Preference statutes by implication. As this Court has often noted, "[i]t is a cardinal

principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U. S. 188, 198 (1939); quoted with approval in *Silver v. New York Stock Exchange*, 373 U. S. 341, 357 (1963) and *Jones v. Mayer Co.*, 392 U. S. 409, 437 (1968). Furthermore, statutes and treaties dealing with the Indians should be construed "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee v. Washington*, 315 U. S. 681, 684-85 (1942).

Nevertheless, the district court concluded that there was an implied repeal of the Indian Preference statutes by the Equal Employment Opportunity Act of 1972, relying only on the extremely broad language of the 1972 Act and Congress' failure to exclude the BIA from its operation in express terms. Neither of these factors are relevant to the issue of implied repeal.⁵ There is nothing in the legislative history of the Equal Employment Opportunity Act which indicates that Congress intended to deal with Indian affairs—a subject which is Congress' special constitutional responsibility.⁶

⁵ The district court also erroneously concluded that "Indians as such are not considered to have rights, so far as here pertinent, different from other citizens; . . ." 359 F. Supp. at 591. It is well established that "the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people." *Hallowell v. United States*, 221 U. S. 317, 324 (1911); see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 156-157 (1942) (U. New Mexico Press reprint 1971) [hereinafter cited as "F. COHEN"].

⁶ U. S. CONST. art. I, § 8, cl. 3: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." Congressional authority is also inherent in the federal government's ownership of the land which tribal units occupy. See *Johnson & Graham's Lessee v. McIntosh*, 21 U. S. (8 Wheat.) 543, 590-91 (1823); *United States v. Kagama*, 118 U. S. 375, 380 (1886).

Read literally, and without regard to the disparate purposes of the two statutes, the Equal Employment Opportunity Act may appear to conflict with the Indian Preference statutes. In relying so heavily on the language of the statutes, however, the court below erred by failing to take into account the history and purpose of the Indian Preference statutes, the unique constitutional status of Indians, and the context in which the more recent legislation was enacted. As Justice Frankfurter remarked: "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded."⁷

The long history of Indian Preference statutes and the unique role of the BIA in furthering the efforts of Indians toward self-government, must all be considered relevant to ascertain the intention of Congress. Considered against this background, it seems clear that if Congress had intended to reverse this century-old policy, it would not have left the matter to implication, but would have done so expressly. Further, if Congress had so intended, it is indeed remarkable that no hint of any such intention is present in any of the legislative history of the 1972 statute.

Statutes recognizing the special status of Indians by establishing a preference for them in positions in the Indian Service have a history going back 140 years. The first important preference statute for Indians was enacted in 1834 to give Indians preference in appointment to positions as "interpreters or other persons employed for the benefit of the Indians, . . . if such can be found, who are properly qualified for the execution of the

⁷ F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947).

duties."⁸ Since 1834, Congress repeatedly enacted preference legislation, emphasizing its desire to increase the representation of Indians in the Indian Service. Five subsequent statutes creating Indian preferences for employment in various positions within the Indian Service,⁹ culminated in Section 12 of the Wheeler-Howard Indian Reorganization Act of 1934, 25 U. S. C. § 472, 48 Stat. 986 (1934), which provides:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Given the cultural, linguistic and historical differences between Indians and other Americans, the preference for Indians in employment for the benefit of Indians would seem to follow as a matter of common sense. Nevertheless, there is a more compelling congressional purpose behind these statutes.

Treaties with the Indians and federal laws dealing with them have long recognized that Indians have retained

⁸ Act of June 30, 1834, 4 Stat. 735, 737, 25 U. S. C. § 45.

⁹ See Act of March 3, 1875, 18 Stat. 420, 449; Act of March 1, 1883, 22 Stat. 433, 451; General Allotment Act of February 8, 1887, 24 Stat. 388, 389-90; Act of August 15, 1894, 28 Stat. 286, 313, 25 U. S. C. § 44; and others. See F. COHEN 160.

their inherent powers of sovereignty.¹⁰ This Court has long recognized that Indians are a "people distinct from others." *The Kansas Indians*, 72 U. S. (5 Wall.) 737, 755 (1867), cited with approval in *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164, 169 (1973). The Bureau of Indian Affairs, the major instrumentality established by federal law to protect the resources of the Indian people, is unique in that it is the only federal agency constitutionally established to govern the affairs of a specific and distinct group of people.¹¹ Yet the employees of the BIA are neither elected nor appointed by Indians they serve and govern.

One of the primary purposes of the Indian Preference statutes is to give Indians some measure of control over their own self-government by making the BIA an agency composed of Indians. Even the most cursory examination of the legislative history of the Indian Preference statutes reveals that they are not intended to provide more jobs for a particular minority group, but that they

¹⁰ *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 559 (1832): "The Indian nations had always been considered as distinct, independent, political communities, retaining their original-natural rights . . . from time immemorial . . ." See also, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445 (1970).

¹¹ *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1819-20 (1968): "The BIA possesses final authority over most tribal actions as well as over many decisions made by Indians as individuals. . . . Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government." See also, F. COHEN *supra*, at 175; Zimmerman, *The Role of the Bureau of Indian Affairs Since 1933*, 311 ANNALS 31, 33 (1957).

are a very important aspect of an express congressional policy in favor of Indian self-determination.¹²

Senator Wheeler, one of the sponsors of the 1934 Preference statute, described the purpose of the legislation as being "to impose upon the Indians self-government in their own affairs," and, "further to give the Indians the control of their own affairs and of their own property."¹³ Representative Hastings, commenting on the bill, declared: ". . . I believe that practical knowledge of Indians and sympathy with them will enable Indian employees to give more beneficial service."¹⁴ The Commissioner of Indian Affairs, John Collier, testified that it was "the chief object of the bill to terminate such bureaucratic authority [as presently existed] by transferring the administration of the Indian Service to the Indian communities themselves."¹⁵

Indians have for many years been frustrated in their efforts to attain self-determination, but there have been recent indications of change. In a recent message to

¹² The policy implemented by the Indian Preference statutes is one of Indian self-determination rather than racial discrimination. It has long been recognized that statutes may treat Indians differently than non-Indians when necessary to serve the legitimate congressional power to regulate Indian tribal relations and property. See, *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 813-815 (E. D. Wash. 1965), *aff'd per curiam*, 384 U. S. 209 (1966). The Indian Preference statutes are not based upon a racial classification, but rather upon the mandate of Article 1, Section 8, Clause 3 of the United States Constitution.

¹³ 78 CONG. REC. 11123, 11125 (1934) (Remarks of Sen. Wheeler).

¹⁴ 78 CONG. REC. 9270 (1934) (Remarks of Rep. Hastings).

¹⁵ Hearings on H. R. 7902, House Comm. on Indian Affairs, 73rd Cong. 2d Sess., at 22 (1934). See also *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 961-969 (1972).

Congress, President Richard Nixon asserted that "the time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."¹⁶

Many Indian tribes are moving toward the self-determination and greater exercise of tribal sovereignty Congress intended. However, for a long time to come they will be subject, in some degree or another, to the authority of the BIA and the Department of Interior. As long as non-Indians occupy management-level and policy making positions within the BIA, Indians will not be able to exercise that control of their own destinies envisioned by Congress.

The special position of the BIA in relation to the Indian can not be overemphasized:

From birth to death [the Indian's] home, his land, his reservation, his schools, his jobs, the stores where he shops, the tribal council that governs him, the opportunities available to him, the way in which he spends his money, disposes of his property, and even in the way in which he provides for his heirs after death—are all determined by the Bureau of Indian Affairs acting as the agent of the United States Government.

. . .

. . . The Bureau must then be comprehended as a system permeating every dimension of Indian life and every element of Indian activity. More than

¹⁶ The American Indian—Message from the President of the United States. 116 CONG. REC. 23131, 23132, (July 8, 1970) [cited hereinafter as "President's Message"].

just the sum of its parts or an aggregate of responsibilities, the relationships between the Indians and the Bureau of Indian Affairs together comprise a total and separate world.¹⁷

How has the Indian fared in this relationship? After more than a hundred years of BIA control of Indian education, Indians under federal supervision have an average education level of only five school years.¹⁸ After more than a hundred years of federal responsibility for Indian health care, Indians have the highest infant mortality rate in the land and Indian life expectancy is nearly one-third shorter than the national average.¹⁹ After more than a hundred years of BIA management of the Indian's wealth, particularly his land, the average Indian's yearly income is half the national poverty level.²⁰

While there may be many reasons why the BIA has failed in its role as guardian of the Indians, one is certainly the presence of substantial numbers of non-Indians in positions of responsibility and authority. Despite the presence of sincere, dedicated civil servants, the BIA is not responsive to the special needs and desires of the people it is supposed to serve.

Congress' repeated enactment of Indian Preference statutes have been largely ignored by the BIA and, as

¹⁷ E. S. CAHN and D. W. HEARNE, *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* 5-6 (1969) (hereinafter "CAHN & HEARNE").

¹⁸ See CAHN & HEARNE *supra*, 27-54; President's Message, 116 CONG. REC. 23133.

¹⁹ See CAHN & HEARNE *supra*, 55-67; President's Message, 116 CONG. REC. 23134.

²⁰ See CAHN & HEARNE *supra*, viii, 68-111; President's Message, 116 CONG. REC. 23134. See also *Indians: Better Dead than Red?*, 42 CALIF. L. REV. 101, 115-119 (1969).

a result, the Indian service agencies have historically been dominated by non-Indians.²¹ It has traditionally been non-Indians who have administered and governed the day-to-day lives of people in a society they can never fully understand.

Non-Indian teachers know little about the history, culture and social conditions of the pupils they teach.²² Non-Indian employees of the BIA, who may be highly qualified and dedicated to helping the Indian people, do not fully understand the Indian's behavior and thinking. "Ultimately, the only persons with an enduring interest in making the Bureau more responsive are the Indians."²³

Recently, Indians were successful in challenging the BIA's very narrow interpretation of the Indian Preference statutes which had kept the vast majority of Indian employees of the BIA in lower paying and less responsible positions while non-Indians comprised 80 per cent of the upper-echelon management, supervisory, and technical positions. In *Freeman v. Morton*, Civil No. 327-71 (D. D. C. Dec. 21, 1971), the District Court for the District of Columbia held that the Indian Preference statutes applied, without exception, to "all initial hirings, promotions, lateral transfers and reassignments."

²¹ See W. E. WASHBURN, *RED MAN'S LAND—WHITE MAN'S LAW* 208 (1971).

²² Many teachers in BIA schools "still see their role as that of 'civilizing the native.' . . . One consequence of this unfortunate situation is a serious communication breakdown between student and staff and a serious lack of productive student-staff interactions." *Indian Education: A National Tragedy—A National Challenge*, S. Rep. No. 91-501, 91st Cong. 1st Sess., 61 (1969). See *New Rider v. Board of Education*, — U. S. —, 94 S. Ct. 733, 736 (1973) (Douglas, J., dissenting).

²³ CAHN & HEARNE *supra*, 155; see generally, *id.* at 147-155.

In speaking for the Indian Preference legislation of 1934, Representative Howard then promised:

Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominately in the hands of educated and competent Indians.²⁴

Recent events have raised the hopes of Indians that the long promised self-government and self-determination are at hand. The judgment of the district court in this case, if sustained, would once again dash those hopes.

The only thing that can be said in favor of the decision below is that it is consistent with a long history of broken promises made by the white man to the original citizens of this land.²⁵ It will be unfortunate for all Americans if this policy is allowed to continue.

²⁴ 78 CONG. REC. 11731 (June 15, 1934) (remarks of Rep. Howard).

²⁵ See W. E. WASHBURN *supra*.

CONCLUSION

The Indian Preference statutes declared invalid by the court below do not conflict with the provisions of the Equal Employment Opportunity Act, are consistent with the long-standing congressional policy of promoting Indian self-government, and are essential to make the Bureau of Indian Affairs more responsive to the needs and desires of the society it serves. **For the foregoing reasons, the judgment of the district court should be reversed.**

Respectfully submitted,

THEODORE S. HOPE, JR.
30 Rockefeller Plaza
New York, New York 10020

DONOVAN LEISURE NEWTON & IRVINE
WILLIAM C. PELSTER
JOSEPH E. FORTENBERRY

Of Counsel

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* This law is also known as the Indian Reorganization Act, the Wheeler-Howard Act, and the Indian Preference Statute of 1934.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-362 and 73-364

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*,

Appellants,

—and—

AMERIND,

Intervenor-Appellant,

—v.—

C. R. MANCARI, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR INTERVENOR-APPELLANT AMERIND

Opinion Below

The opinion of the District Court is reported at 359
F. Supp. 585 (D.N.M. 1973).¹

¹ A copy of the opinion may be found in Appendix B of Amerind's Jurisdictional Statement (hereinafter "JSA"). Citations to "App." refer to the Appendix prepared in No. 73-362, with which this appeal has been consolidated.

Jurisdiction

The District Court entered judgment on June 1, 1973. On June 29, 1973, the Government and Intervenor-Defendant Amerind filed notices of appeal. This Court noted probable jurisdiction in the Government's appeal on January 14, 1974, and in Amerind's appeal on February 22, 1974. On the latter date, it ordered that the two appeals be consolidated.

Statutes Involved

The Indian Preference Statute of 1934, 25 U.S.C. § 472 (1970), provides as follows:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Earlier legislation providing preference for Indian employees in the Federal Indian agency include 25 U.S.C. §§ 44, 45 and 46 (1970).

Section 717(a) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(a) (Supp. II, 1972), provides as follows:

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in Section 102 of Title 5 [United States Code], in executive agencies (other than

the General Accounting Office) as defined in Section 105 of Title 5 [United States Code] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Questions Presented

1. Whether the District Court erred in holding that by passing the Equal Employment Opportunity Act of 1972, which imposed a general prohibition on discrimination in employment in the Federal Government, Congress had impliedly repealed its Indian Preference legislation, including a statute passed nearly forty years earlier which specifically gave preference to qualified Indians in appointment to vacancies in the Bureau of Indian Affairs.

2. Whether the Indian Preference legislation, in particular 25 U.S.C. § 472, which was designed to give members of Indian Tribes a measure of self-government, violates the Fifth Amendment to the United States Constitution.

Statement of the Case

1. *The Bureau of Indian Affairs and Indian Preference*

The American Tribal Indian occupies a unique position in the constitutional framework of the United States. Specifically recognized by the Constitution,² the Indian Tribes

² U.S. Const. art. I, § 2, cl. 3; art. I, § 8, cl. 3; amend. XIV, § 2.

are considered domestic dependent nations.² Congress has subjected them to an entire body of laws applicable to them alone. *See* Title 25, U.S.C. (1970). For example, the Tribes are permitted to establish their own systems of criminal and civil courts and to establish official religions. *See* p. 24 *infra*.

The Bureau of Indian Affairs³ is likewise unique, since it is the only agency of the Federal Government which governs the lives of one distinct class of people.⁴ It controls almost all aspects of Indian reservation life, and its jurisdiction extends to the Indians' land, education, employment, health, welfare, economic and industrial assistance, and general support. However, it should be noted that the Bureau supervises only members of federally-recognized Tribes, not all Indians.⁵

On a number of separate occasions between 1834 and 1894, Congress passed laws designed to promote the staffing of the Indian agency by Indians. *See*, for example, 25 U.S.C. §§ 44, 45 and 46 (1970). However, as the legislative history of the 1934 Statute, 25 U.S.C. § 472, makes clear, the

² *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 167 (1973); *Baker v. Carr*, 369 U.S. 186, 215 (1962).

³ The Federal Indian services consist of the Bureau of Indian Affairs, which is part of the United States Department of the Interior, and the Indian Health Service, which is part of the United States Department of Health, Education, and Welfare. The Indian Health Service regards itself as subject to the Indian Preference Statutes. However, the Bureau of Indian Affairs is the more important of the two agencies and the only agency directly involved in this case. Therefore, this Brief refers primarily to the Bureau, although many of the arguments would also apply to the Indian Health Service.

⁴ The only agency remotely resembling the Bureau is the Office of Territorial Affairs in the Department of the Interior.

⁵ Many Tribes have terminated their relationship with the Federal Government.

Government failed to put these Congressional directives into effect, with the result that by 1934 the Indian Office (as it was then called) employed proportionately fewer Indians than in 1900.⁷ Thus, Senator Norbeck stated during the hearings on the bill that became the Indian Reorganization Act of 1934:

"I think we have utterly fallen down in the present system. The Indian has been excluded. The reservation has been filled up with white people who live off the Indians." *Senate Hearings*, pt. 2 at 259.

Congress accordingly passed Section 472 of the 1934 Act, which expressly permits Indians to be appointed to the "Indian Office" without regard to civil service laws, and provides that "... qualified Indians shall hereafter have the preference to appointment to vacancies" in that agency.

The predominant purpose of Section 472, as manifested in the extensive legislative history, was to provide the Indians with a measure of self-government.⁸ The legislators repeatedly emphasized that the aim of the provision was to give Indians the opportunity to run the Government agency controlling Indian affairs, and that this agency was

⁷ Memorandum on S. 2755 submitted to the Senate Committee by the Bureau of Indian Affairs by John Collier, Commissioner for Indian Affairs, reprinted in *Hearings on S. 2755 and S. 3645 before Senate Committee on Indian Affairs*, 73d Cong., 2d Sess., pt. 1 at 19 (1934) (hereinafter "*Senate Hearings*").

⁸ The United States Court of Appeals for the Tenth Circuit recently stated, in a case ruling that Section 472 did not apply to reductions-in-force, that:

"[Section 472] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian." *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956, 960 (10th Cir. 1970), cert. denied, 401 U.S. 981 (1971).

unique in the Federal Government. During the hearings on the bill, Senator Wheeler, Chairman of the Senate Committee on Indian Affairs and one of the sponsors of the bill, stressed that:

"[The Indian Office] is an entirely different service from anything else in the United States because these Indians own this property. It belongs to them. What the policy of this government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property. . . ." *Senate Hearings* 256.

During the debate, Senator Wheeler declared that the bill "seeks to impose upon the Indians self government in their own affairs," 78 Cong. Rec. 11123 (1934). And in the House debate, Representative Howard, the other sponsor of the bill, said:

"The Indians have not only been thus deprived of civic rights and power, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs." 78 Cong. Rec. 11729 (1934).

2. *The Freeman Case*

The present suit arises from the efforts of Indians to obtain full compliance by the Federal Government with the 1934 Statute. For 38 years after the passage of the Act, the Government refused to apply Indian Preference to promotions and lateral job reassignments within the Bureau of Indian Affairs, and instead restricted it to situations where qualified Indian and non-Indian applicants were competing from outside the Bureau for a position in the Bureau.* Indian employees of the Bureau consequently

* Prior to 1966, the Bureau did not even apply Indian Preference to such limited appointments in a consistent fashion. Testimony of Raymond Gunter, App. 181.

made little headway. The United States Court of Appeals for the Tenth Circuit observed that:

"As the non-Indian employees retired or moved on to other jobs, competent Indians were expected to have taken their place. Unfortunately, this has apparently not happened, especially in the policy-making positions." *Mescalero Apache Tribe v. Hickel, supra*, 432 F.2d at 960.

Testimony in this case indicated that in May, 1972, 57 percent of the 16,500 employees of the Bureau were Indian. However, 76 percent of the employees at GS-7 and below were Indian, while only 21 percent of the employees at GS-9 and above were Indian.¹⁰

On February 5, 1971, four Indian employees of the Bureau brought suit in the United States District Court for the District of Columbia against the Secretary of the Interior and certain officials of the Bureau challenging the narrow interpretation of the Indian Preference Statutes then in operation, and arguing that Indian Preference should be extended to the areas of promotion, reassignment and training. A new Preference Policy, under which Indian Preference would be extended to promotions and reinstatements, was announced in 1972, while the suit was in progress. However, the suit proceeded on the issues whether Indian Preference extended to training, lateral transfers and reassignments, and whether exceptions to Indian Preference could be granted.

On December 21, 1972, the District Court (Corcoran, J.) entered summary judgment in favor of plaintiffs,¹¹ and

¹⁰ *Id.*, App. 191.

¹¹ Except on the training issue, which the court resolved in favor of defendants.

held that 25 U.S.C. § 472 required that Indian Preference be applied to "all initial hirings, promotions, lateral transfers and reassignments" in the Bureau, and that no exceptions could be granted. *Freeman v. Morton*, Civ. No. 327-71 (D.D.C. Dec. 21, 1972),¹² JSA, App. D at 46-47.

Although the constitutionality of the Indian Preference Statutes was not at issue in *Freeman*, the District Court noted in dictum that not all classifications based on race are invalid. It also commented that the Indian Preference Statutes appeared to be a rational exercise of Congress' broad powers to "... do all that [is] required ... to prepare the Indians to take their place as independent, qualified members of the modern body politic," citing *Board of County Commissioners v. Seber*, 318 U.S. 705, 715 (1943).¹³

3. *The Proceeding Below*

Following the announcement in June, 1972, of the new Indian Preference Policy, plaintiffs in this case, four non-Indian employees of the Bureau in Albuquerque, New Mexico, brought this action in the United States District Court for the District of New Mexico seeking to enjoin defendants from enforcing the new policy. Plaintiffs attacked the Indian Preference Statutes on two grounds: first, that they deprived plaintiffs of their right to property without due process of law, thereby contravening the Fifth Amendment to the United States Constitution; and second, that they were in direct conflict with the rights of

¹² The Government has appealed the decision to the extent that it applies Indian Preference to lateral transfers and that it denies authority to grant exceptions. Oral argument was heard by the United States Court of Appeals for the District of Columbia Circuit on February 21, 1974. No decision had been handed down as of the date of this Brief.

¹³ JSA, App. D at 41 n. 3.

non-Indian employees of the Bureau protected under Section 717(a) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(a).

Upon motion of plaintiffs, a three-judge court was convened to hear the case, since plaintiffs sought to enjoin the enforcement of Federal statutes, in part upon the ground that they were repugnant to the United States Constitution. The District Court held that the case could proceed as a class action. On November 20, 1972, it entered an order permitting Amerind to intervene in the case as a party defendant.

On June 1, 1973, following a hearing on the merits, the District Court entered judgment in favor of plaintiffs. Despite the fact that the Indian Preference Statutes are special legislation, applicable only to two small Indian agencies, the court held that they had been impliedly repealed by the Equal Employment Opportunity Act of 1972, a law applying to the Federal Government generally. Extensive legislative history of the 1934 Act had been placed before the court in order to demonstrate that the primary intent of Congress in passing that statute was to promote self-determination for the Indian Tribes. In addition, Raymond Gunter, Personnel Officer for the Bureau, testified that the new Preference Policy announced in 1972 would considerably increase the rate at which Indians would advance into the higher levels of the Bureau, thus demonstrating how Indian Preference, fully applied, would further the Congressional purpose of an Indian-run Bureau of Indian Affairs. App. 192, 195.¹⁴ Apparently ignoring

¹⁴ Mr. Gunter also testified that, had the new policy been implemented earlier, there would have been a much greater number of Indian employees at all levels in the Bureau, including the higher-level positions. App. 199.

the record before it, the District Court stated that no evidence had been introduced to show any "national-public purpose concerned in the Preference Policy as compared with the nondiscrimination statutes." 359 F. Supp. at 591, JSA, App. B at 34.

The court did not reach the question of the constitutionality of the Indian Preference Statutes. However, it stated that in the absence of evidence to indicate that an important governmental objective lay behind the statutes, "we could well hold that the statute must fail on constitutional grounds." 359 F. Supp. at 591, JSA, App. B at 35. The court apparently believed that Indian Preference was a purely racial classification, since it assumed that Indian Preference applied to "all Indians as individuals," (359 F. Supp. at 588, JSA, App. B at 30), despite clear evidence of record to the contrary.¹⁸ No mention was made of the extensive legislative history of the 1934 Statute, introduced by defendants, which clearly demonstrated that the primary purpose of that statute was to help federally-recognized Tribes towards self-government.

The Government and Amerind both filed Notices of Appeal with this Court on June 29, 1973. On August 16, 1973, upon application by the Government, the Court (Marshall, J.), stayed the enforcement of the District Court's judgment pending disposition of the appeal.

¹⁸ Only members of federally-recognized Tribes are eligible for Indian Preference. App. 92, 200.

Summary of Argument

1. Congressional approval of Indian Preference in the basic civil rights legislation and in a statute passed subsequent to the 1972 Equal Employment Opportunity Act demonstrates that in passing the latter statute Congress did not intend to repeal the 1934 Indian Preference Statute. Moreover, under well-established principles of statutory construction, general legislation, such as the 1972 Act, does not impliedly repeal earlier special legislation.

2. In passing the 1934 Indian Preference Statute, Congress was using its uniquely broad powers to legislate for the benefit of Indian Tribes. These powers are derived from the unique constitutional position of these "domestic dependent nations." There was, and still is, a valid governmental purpose behind the statute—to give Indian Tribes a measure of self-government—which was more than ample to override any possible constitutional objections. Furthermore, the 1934 Statute does not result in a purely racial classification, since not all Indians are eligible for Indian Preference.

ARGUMENT

I.

In Passing the Equal Employment Opportunity Act of 1972 Congress Did Not Intend to Repeal the Indian Preference Statutes.

It is a cardinal principle of this Court that, when two acts of Congress appear to be in conflict, the Court will give effect to both if that result is possible.¹⁶ Repeals by implication are disfavored;¹⁷ and the intention of Congress to repeal an earlier act by subsequent legislation "must be clear and manifest."¹⁸

The Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e, *et seq.*, did not by its own terms expressly repeal the Indian Preference Statutes; nor is there a single word in the legislative history of that statute to suggest that Congress intended such a repeal. To the contrary, other congressional actions taken before and after passage of the 1972 Act make it almost inconceivable that Congress could have intended to sweep away sub silentio the special laws which it has developed over the past 140 years to promote Indian self-determination. Moreover, the principles of statutory construction simply do not permit a broad statute applicable to virtually the entire Federal Government to repeal by implication an earlier special statute re-

¹⁶ *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49, 61-62 (1932).

¹⁷ *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968); *Amell v. United States*, 384 U.S. 158, 165-66 (1956).

¹⁸ *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Red Rock v. Henry*, 106 U.S. 596, 601-02 (1882).

lating solely to Indian employees of two small Government agencies.

A. The Indian Preference Statutes and the Equal Employment Opportunity Act Have Different Purposes and Are Not Mutually Exclusive.

The primary purpose of the Indian Preference Statutes was to provide Tribal Indians with a method for governing themselves.¹⁹ The statutes were not intended to ensure the Indians equal employment opportunities; nor are they "affirmative action" programs in disguise. Indian Preference extends only to the Indian Health Service and the Bureau of Indian Affairs; and the preference is available only to Federally-recognized Tribal members, and not to all Indians. App. 200. Indians receive no preference of any sort from other Federal agencies. The Bureau of Indian Affairs is unique among Federal agencies, because it is the only agency of the United States which is responsible for governing the affairs of one distinct group of people within our borders.²⁰

The Indian Preference Statutes reflect a decision by Congress that its responsibilities to the Indian Tribes will be carried out best if Indians administer their own affairs, a policy that fully accords with the concept of the Indian Tribes as domestic dependent nations.²¹ Like the Tribes' unique privilege of establishing their own courts and crimi-

¹⁹ See p. 29 *infra*.

²⁰ Senator Wheeler, one of the sponsors of the Indian Preference Statute of 1934, stated that the Bureau "is an entirely different service from anything else in the United States. . . ." *Senate Hearings* 256.

²¹ *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 168 (1973); *Baker v. Carr*, 369 U.S. 186, 215 (1962).

nal codes,²³ the Indian Preference Statutes provide a measure of self-regulation which is really a variety of home rule.²⁴

The Indian Preference Statutes and the Equal Employment Opportunity Act are not mutually exclusive. They might appear to be irreconcilable if one ignores this Court's settled rule that the policy and spirit, as well as the letter, of the statutes are important factors when considering repeal by implication.²⁴ The goal of the Indian Preference Statutes, self-determination by the Tribes of their own affairs as domestic dependent nations, is sui generis. Neither the Indian Preference legislation nor the Bureau of Indian Affairs has a counterpart elsewhere in the civil service. Even the appellees admit that "Indians have had a different and perhaps unique status and relation to the United States."²⁵

The thorough analysis of the history of Indian Preference policies contained in the Government Brief shows how Congress has provided for such Preference from 1834 to the present day. It is highly improbable that Congress, in passing legislation to prevent discrimination by the Federal Government against minority groups, intended to repeal time-honored legislation designed to assist the members of one such group towards self-determination.

²³ *Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Quiver*, 241 U.S. 602 (1916); *Ex parte Crow Dog*, 109 U.S. 556 (1883).

²⁴ See M. Price, *Law and the American Indian* 8-9 (1973).

²⁵ *Eastern Extension, Australasia & China Tel. Co. v. United States*, 231 U.S. 326, 333 (1913).

²⁶ Motion To Dispense with Printing of Motion, To Dismiss Appeal, and To Affirm the Decision of the Lower Court at 8.

B. *The Legislative History of the Civil Rights Legislation Demonstrates Congressional Approval of Indian Preference.*

The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which, *inter alia*, prohibited discrimination by private employers because of race, expressly exempted Indian Preference programs. Section 703(i), 42 U.S.C. § 2000e-2(i), provides that the prohibition does not apply to

“any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice . . . under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.”

Senator Humphrey, who sponsored this provision, observed that:

“This exemption is consistent with the *Federal Government's policy of encouraging Indian employment* and with the special legal position of Indians.” 110 Cong. Rec. 12721 (1964) (emphasis supplied).²²

Thus, in 1964, Congress reaffirmed its faith in the wisdom and necessity of Indian Preference by expressly exempting private employers who adopted Indian Preference programs from the general sanctions of the 1964 Civil Rights Act.

The 1972 Equal Employment Opportunity Act, which the lower court held had impliedly repealed the Indian Preference Statutes, was an amendment to the 1964 Act designed primarily to strengthen the enforcement powers of the Equal Employment Opportunity Commission. Sec-

²² Senator Mundt also supported the provision, declaring that it would enable Indians “to benefit from Indian preference programs now in operation or later to be instituted.” 110 Cong. Rec. 13702 (1964).

tion 717(a), which was added in committee, essentially codified existing constitutional requirements and Executive Orders barring discrimination in the Federal Government,²⁷ and gave Federal employees increased enforcement rights. In amending the 1964 Act, Congress neither altered nor repealed Section 2000e-2(i), which, even now, allows private employers to augment the Federal Government's Indian Preference programs. It is inconceivable, in these circumstances, that Congress could have intended the 1972 Act to repeal sub silentio the Federal Government's own Indian Preference programs, while continuing to permit Indian Preference in private employment.

This conclusion is fortified by the fact that *after* passing the Equal Employment Opportunity Act of 1972, Congress enacted additional Indian Preference laws: 20 U.S.C. § 887c (a) and (d), and 20 U.S.C. § 1119a (Supp. 1973). These provisions, which are part of the Education Amendments Act of 1972, Pub.L. No. 92-318, require that in programs for the training of teachers for Indian children, "preference shall be given to the training of Indians."²⁸ It is hard to believe that, if Congress had intended to sweep away Indian Preference in the Bureau of Indian Affairs as being in conflict with the goals of the Civil Rights legislation, it would specifically have imposed an Indian Preference policy in government-funded programs a few months later.

²⁷ *Bolling v. Sharpe*, 347 U.S. 497 (1954); Executive Orders 11246, 3 C.F.R. 172 (1973), and 11478, 3 C.F.R. 214 (1973). Section 701(b) of the 1964 Act itself stated that it was "the policy of the United States to insure equal employment opportunities for Federal employees. . . ." 78 Stat. 254. See also 118 Cong. Rec. S. 2279 (daily ed., Feb. 22, 1972) (remarks of Senator Cranston).

²⁸ The preference provision was added in conference. See *U.S. Code Congressional and Administrative News*, vol. 2, 1773, 2659, 92d Cong., 2d Sess. (1972).

C. Repeal of the Indian Preference Statutes Would Eliminate the "Excepted Service" Through Which the Majority of Indians Enter the BIA: Congress Could Not Have Intended Such a Result.

The first sentence of the 1934 Preference Statute, 25 U.S.C. § 472, authorizes the appointment of Indians to the Bureau "without regard to civil-service laws." This has given rise to the so-called "Excepted Service" within the Bureau, whereby Indians are exempted from taking civil service examinations or meeting civil service requirements in qualifying for initial appointment to the Bureau of Indian Affairs.²⁹

As a result of this exemption from initial civil service requirements, large numbers of Indians work in the BIA who otherwise might not have been hired.³⁰ Testimony before the lower court indicated that at least half the Bureau's present Indian staff belongs to the Excepted Service (App. 194); and it is believed that most Indians joining the Bureau do so by this route.

Plainly, if Congress had intended to repeal that part of Section 472 giving Preference to qualified Indians, it must also have meant to eliminate the Excepted Service

²⁹ 5 C.F.R. § 213.3112(a)(7) (1973). An Indian who desires to transfer to another Federal agency must take civil service examinations and pass all civil service requirements like any other Federal employee; see App. 197.

³⁰ The legislative history of the Statute makes clear the reasons for establishing the Excepted Service:

"At the present time, by reason of the civil-service rules and regulations, we find that competent Indians are absolutely unable to take or hold positions in the Indian Service." 78 Cong. Rec. 11123 (1934) (remarks of Senator Wheeler).

"I do not think that the broad horizontal civil-service requirements fit; I do not think they are of the type to meet the peculiar requirements of the Indian Service generally." *Hearings on H.R. 7902 before House Committee on Indian Affairs*, 73d Cong., 2d Sess. at 39 (1934) (Commissioner Collier).

provision, which is an integral part of the section. In that event, Indians wishing to serve in the Bureau of Indian Affairs would be subject to normal civil service regulations, and doubtless far fewer would be hired. Such a result would be exactly the opposite of the result intended by Congress in passing the 1934 Statute: to gradually turn the Indian agency over to the Indians. It would also be directly contrary to the current policy of the Federal Government, which was well expressed in a 1970 Presidential Message to Congress:

"The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." H.R. Doc. No. 91-363, 91st Cong., 2d Sess., 116 Cong. Rec. 23132 (1970).

It would be a travesty to hold that the 1972 Act, which was aimed at providing "Federal jobs and real advancement opportunities for minority groups in Federal service,"²¹ had sub silentio eliminated the most important means by which the members of a severely deprived minority group are enabled to serve their own people in the Federal Government.²²

²¹ 118 Cong. Rec. S. 2287 (daily ed., Feb. 22, 1972) (remarks of Senator Cranston).

²² Congress may very well not have intended the 1972 Act to apply to the Excepted Service generally. Section 717(a), 42 U.S.C. § 2000e-16, covers not only Federal military departments and executive agencies, but also "those units of the Government of the District of Columbia *having positions in the competitive service*, and . . . those units of the legislative and judicial branches of the Federal Government *having positions in the competitive service*." (emphasis supplied). In its section-by-section analysis of the bill, the House Report states with reference to Section 717(a):

"All personnel actions affecting employees or applicants for employment in the competitive service of the United States . . . shall be made free from any discrimination based on

D. In the Absence of Legislative Intent to the Contrary, General Legislation Does Not Repeal Earlier Special Legislation.

Even if the District Court had been justified in disregarding the express intentions of Congress concerning Indian Preference, it clearly erred in holding that the Indian Preference Statutes were impliedly repealed by the Equal Employment Opportunity Act of 1972. "The cardinal rule is that repeals by implication are not favored."³³ It is a universally recognized rule of statutory construction that when one statute applies only to a specific factual situation, it will control another statute applying to a general situation, regardless of the priority of enactment.³⁴ This Court has emphasized that, when two statutes are applicable, both should be given effect, and that a partial overlap of the statutes does not repeal, *pro tanto*, the provisions of

race, color, religion, sex or national origin." H.R. Rep. No. 92-238, 92d Cong., 2d Sess. at 32 (1972), *U.S. Code Congressional and Administrative News*, vol. 2, 2137, 2167 (1972) (emphasis supplied). See also S. Rep. No. 92-415, 92d Cong., 1st Sess., at 45 (1971).

A section-by-section analysis introduced by Senator Williams, one of the sponsors of the Act, states:

"All employees of any agency, department, office or commission having positions in the competitive service are covered by this section." 118 Cong. Rec. S. 2301 (daily ed., Feb. 22, 1972) (emphasis supplied).

Even though the Act by its terms applies to all employees of the Executive agencies, this legislative history suggests that Congress may have had only the Competitive Service in mind, and meant to exempt the Excepted Service at the Bureau, and elsewhere in the Federal Government, from Section 717(a).

³³ *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936); accord, *Jones v. Mayer Co.*, 392 U.S. 409, 437 (1968).

³⁴ *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). See also *Squire v. Capoeman*, 351 U.S. 1, 10 (1956), and *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), both cases involving Indians. One reason for this rule is that Congress on occasion overlooks the possible effect of its actions on prior legislation. See *Wilderness Society v. Morton*, 479 F.2d 842, 881 (D.C. Cir. 1973) (*en banc*).

the earlier statute.³⁵ Furthermore, statutes and treaties involving Indians should be construed "in a spirit which generously recognizes the full obligations of this nation to protect the interests of a dependent people."³⁶ In a similar context, also involving a guardianship relationship, this Court recently observed "what Congress has plainly granted we hesitate to deny." *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 357 (1971).

The District Court's conclusion that this case does not involve the relationship of a general statute to a special statute³⁷ is inexplicable. The 1972 Equal Employment Opportunity Act applies to virtually the entire Federal Government, while the Indian Preference Statutes cover only two small agencies.³⁸ In the context of government operations, a special statute is one which applies to certain designated agencies but does not affect the operations of other agencies governed by broader statutory provisions.³⁹ There can be no doubt that the Indian Preference Statutes constitute special legislation, and that the Equal Employment Opportunity Act is general legislation within the meaning of the rule. The District Court's determination therefore cannot stand.

³⁵ See *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

³⁶ *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). This Court has frequently likened the relationship between the Indians and the United States to that between a ward and his guardian. See, e.g., *Baker v. Carr*, 369 U.S. 186, 215 (1962).

³⁷ JSA, App. B at 33.

³⁸ See n. 4 *supra*.

³⁹ See *Myers v. Hollister*, 226 F.2d 346, 349 (D.C. Cir. 1955); cert. denied, 350 U.S. 987 (1956); cf. *Panama Canal Co. v. Anderson*, 321 F.2d 98 (5th Cir. 1963), cert. denied, 375 U.S. 832 (1963).

II.

The Indian Preference Statutes Are Constitutional Because They Are a Reasonable Exercise of the Uniquely Broad Power of Congress to Enact Special Legislation Promoting Self-Government by Indian Tribes.

Although the District Court did not resolve the constitutional issue, it suggested that it could have held that the Indian Preference Statutes violate the Due Process Clause of the Fifth Amendment because they do not further a "reasonable governmental purpose."⁴⁰ If this Court decides that the Indian Preference Statutes have not been repealed by implication, then it may wish to consider the constitutional issue. We submit that there was more than enough evidence in the record below to demonstrate that the Indian Preference Statutes are constitutional, as a reasonable exercise of Congress' broad power to enact legislation to protect Indian Tribes, and to assist them towards the goal of self-government.

A. *The Indian Tribes and the Power of Congress to Govern Them Are Unique.*

1. The Constitution Grants Congress Plenary Power to Regulate Indian Affairs.

The broad power of Congress over Tribal affairs, and the corresponding rights to which Indians are entitled, rest upon constitutional provisions which apply to Indians alone. Congress has plenary power over the Indian Tribes,⁴¹ which emanates from three enumerated powers in the Con-

⁴⁰ JSA, App. B at 35.

⁴¹ See *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 716 (1943); *United States v. Kagama*, 118 U.S. 375, 384 (1886).

stitution: the power to declare war,⁴² the power to make treaties,⁴³ and the power to regulate commerce with the Indian Tribes.⁴⁴ The power of Congress to regulate commerce with the Indian Tribes is "exceedingly broad"; it "gained breadth by reason of historic experiences that induced Congress to treat Indians as wards of the Nation."⁴⁵ Together, these powers comprehend all that is required for the regulation of the relationships between the United States and Indian Tribes.⁴⁶

This Court has repeatedly upheld the power of Congress to enact special legislation for the protection and benefit of the Indians.⁴⁷ The power of Congress to enact laws to protect and benefit Indians remains, even though Indians have been granted citizenship.⁴⁸

⁴² U.S. Const. art. I, § 8, cl. 9.

⁴³ U.S. Const. art. II, § 2, cl. 2; *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 n. 7 (1973); *Ex parte Crow Dog*, 109 U.S. 556, 561-66 (1883).

⁴⁴ U.S. Const. art. I, § 8, cl. 3; see *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 159 (1973) (Douglas, Brennan & Stewart, JJ., concurring and dissenting in part).

⁴⁵ *Mescalero Apache Tribe v. Jones*, *supra*, 411 U.S. 145, 159.

⁴⁶ *Worcester v. Georgia*, 31 U.S. 350, 379, 6 Pet. 515, 560 (1832) (Marshall, C.J.).

⁴⁷ See, e.g., *Bd. of Comm'rs v. United States*, 308 U.S. 343 (1939); *United States v. McGowan*, 302 U.S. 535 (1937).

⁴⁸ *United States v. Nice*, 241 U.S. 591, 598 (1916) ("Citizenship is not incompatible with continued Tribal existence or continued guardianship, and so may be conferred without . . . placing [Indians] beyond the reach of Congressional regulations adopted for their protection.") See also *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 718 (1943); *United States v. Sandoval*, 231 U.S. 28, 48 (1913); *New Mexico ex rel. State Highway Comm'n v. United States*, 148 F. Supp. 508, 511 (D.N.M. 1957).

Although Congress' power over Indian affairs is not completely unfettered," "Congress is invested with a wide discretion and its actions, unless purely arbitrary, must be accepted and given full effect by the Courts."²⁰

Congress' discretion in regulating Tribal affairs is unusually broad because there are no constitutional restraints analogous to those which limit Congressional power over the states and over individual citizens.²¹ Furthermore, the Constitution does not restrain Indian Tribes to the same extent that it limits the power of the states and the Federal Government.²² This Court has declared that "Congress alone has the right to determine the manner in which this country's guardianship over the Indians will be carried out. . . ." ²³

The District Court ignored the unique constitutional provisions which grant Congress a singularly broad power to regulate Tribal affairs as it deems best. Congress' decision that the agency responsible for governing the Tribes should be staffed with Tribal members was well within its discretion because, as subsequent discussion makes clear, the Indian Preference Statutes are a reasonable method of providing a means of self-government to the Tribes, which still possess a residual, inherent sovereignty.²⁴

²⁰ See *Perrin v. United States*, 232 U.S. 478, 486 (1914); *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

²¹ *Perrin v. United States*, 232 U.S. 478, 486 (1914).

²² See, e.g., U.S. Const. amends. I-X. See generally Comment, *The Indian Battle for Self-Determination*, 58 Cal. L. Rev. 445, 451 (1970).

²³ *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959); see *Talton v. Mayes*, 163 U.S. 376 (1896).

²⁴ *United States v. McGowan*, 302 U.S. 535, 538 (1938).

²⁵ See *Worcester v. Georgia*, 31 U.S. 350, 6 Pet. 515 (1832); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

2. The Indian Tribes Are Unique Constitutional Entities.

The legal status of Tribal Indians is *sui generis*. Unlike the members of every other ethnic minority, they constitute distinct, political communities, whose anomalous and complex relationship to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.⁵⁵

This Court has long recognized the Indian Tribes as separate political entities which possess some degree of sovereignty.⁵⁶ As recently as last year the Court reaffirmed its time-honored doctrine that the Indian Tribes are separate, albeit dependent nations.⁵⁷ It has been said that "Indian tribes are not states. They have a status higher than states."⁵⁸

The decisions of this Court reflect the unique status of Indian Tribes. In the absence of Federal legislation, the Tribes may establish their own courts and penal codes,⁵⁹ and may levy taxes.⁶⁰ No other ethnic minority in the Union has such rights. Even now, the Tribes may recog-

⁵⁵ *Baker v. Carr*, 369 U.S. 186, 215 (1962); *United States v. Kagama*, 118 U.S. 375, 378-79 (1886); *Worcester v. Georgia*, 31 U.S. 350, 368, 6 Pet. 515, 542-43 (1832) (Marshall, C.J.); see *Cherokee Nation v. Georgia*, 30 U.S. 1, 5 Pet. 1, 16, 17 (1831).

⁵⁶ *Colliflower v. Garland*, 342 F.2d 369, 374 (9th Cir. 1965); see, e.g., *Worcester v. Georgia*, 31 U.S. 350, 6 Pet. 515 (1832).

⁵⁷ See *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 168 (1973).

⁵⁸ *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959).

⁵⁹ *Williams v. Lee*, 358 U.S. 217 (1959).

⁶⁰ *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 556 (8th Cir. 1958), cert. denied 358 U.S. 932 (1959); see *Buster v. Wright*, 203 U.S. 599 (1906), dismissing appeal from 135 F. 947, 950-52 (1905). See generally R. Bennett & F. Hart, *Felix S. Cohen's Handbook of Indian Law* 142 (1942 ed.; Univ. N.M. reprint 1971).

nize and support an official religion, a power denied the states and the Federal Government.⁶¹ There are numerous other examples of the singular legal status of the Indian Tribes.⁶²

The Indians have a unique legal status because they comprise a nation which claimed and received the protection of a more powerful nation, the United States, but did not abandon their national character in gaining their protection.⁶³ Congress' unusual powers over the Indians, and the Court's recognition of their unique place in American law, exist not because Indians belong to a different race, but because they owe allegiance to the Tribes.⁶⁴

The peculiar status of the Indian nations or Tribes was well summarized in a passage from the leading work on

⁶¹ Compare U.S. Const. amend. I with 25 U.S.C. § 1302(1) (1970); see *Engel v. Vitale*, 370 U.S. 421 (1962); *Zorach v. Clauson*, 343 U.S. 306 (1952). Until 1968, when Congress, exercising its plenary power over the Tribes, enacted an "Indian Bill of Rights" as part of the Civil Rights Act, 25 U.S.C. §§ 1301-03 (1970), the Indians were generally immune from the restrictions of the Bill of Rights. *Talton v. Mayes*, 163 U.S. 376 (1896); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

⁶² See generally R. Bennett & F. Hart, *Felix S. Cohen's Handbook of Indian Law* 89-236, 268-347, 358-82 (1942 ed.; Univ. N.M. reprint 1971). The unique position of the Indians is highlighted by an equally unique canon of statutory construction developed by this Court that doubtful expressions and ambiguities in legislation are to be construed in favor of Indians whenever their rights are at stake. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174, 176 (1973); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

⁶³ *Worcester v. Georgia*, 31 U.S. 350, 376, 6 Pet. 515, 555 (1832).

⁶⁴ "The events which led to the decisions, including treaties and physical conquests, have no parallel in the background of non-Indian groups. . . ." Vieira, *Racial Imbalance, Black Separatism and Permissible Classification by Race*, 67 Mich. L. Rev. 1553, 1577-81 (1969), reprinted in M. Price, *Law and the American Indian* 93, 97 (1973).

Indian law (F. Cohen, *Handbook of Federal Indian Law*, quoted with approval by the United States Court of Appeals for the Tenth Circuit in *Native American Church v. Navajo Tribal Council*, *supra*, 272 F.2d at 133-34):

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.'" *See also, e.g., Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971).

The term "Indian," as the Constitution, Congress, and this Court have always used it, is primarily a *political* designation rather than a purely racial classification.⁶⁸ The relevant constitutional provisions refer not to Indians as a race, but to *Indian Tribes* and *Indians not taxed*.⁶⁹ In particular, the constitutional provision sanctioning treaties

⁶⁸ *See* Cohen, *Indian Rights and the Federal Courts*, 24 Minn. L. Rev. 144, 186 n. 128 (1940).

⁶⁹ U.S. Const. art. I, § 8, cl. 3; art. I, § 2, cl. 3; amend. XIV, § 2. Indians, of course, have always been able to remove themselves from the Constitution's designation, and from Congress' special treatment, by severing their ties with a Tribe. *Cf. Elk v. Wilkins*, 112 U.S. 94, 102 (1884).

with the Indians, "admits their rank among those powers who are capable of making treaties." "

The District Court erred in treating this as a "reverse discrimination" case. *See* JSA, App. B at 33. It is not. The Indian Preference Statutes apply only to members of Federally-recognized Tribes. App. 200. Non-Tribal Indians and members of terminated Tribes do not receive any preference. Furthermore, even Tribal members do not receive a preference in Federal employment generally, but only in the special Bureau which governs the Tribes.

3. The Bureau of Indian Affairs Is as Unique as the Indian Tribes It Governs.

The Bureau of Indian Affairs has no counterpart elsewhere in the Federal Government. App. 196." Dealing exclusively with the members of the domestic dependent nations within our borders, the Bureau possesses almost absolute control over their lives: from birth until death, Indians' homes, land, education, employment, health, welfare, economic and industrial assistance, general support, and "civilization" come under the jurisdiction of the Bureau."

" *Worcester v. Georgia*, 31 U.S. 350, 379, 6 Pet. 515, 559-60 (1832) (Marshall, C.J.). Although treaty-making was abandoned by the Act of March 3, 1871, 16 Stat. 544, 556 (1871), the treaties previously entered into remain in force, and still provide a fertile source of litigation. *See, e.g., Menominee Tribe v. United States*, 391 U.S. 404 (1968), *aff'd* 388 F.2d 998 (Ct. Cl. 1967); *Lesch Lake Band of the Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971).

" The uniqueness of the Bureau prompted Senator Wheeler, co-sponsor of the 1934 Indian Reorganization Act, to state that the Bureau "is an entirely different service from anything else in the United States because these Indians own this property." *Senate Hearings* 256.

" Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1819-20 (1968).

Almost all of the Bureau's programs deal with reservation Indians and therefore with lands and property owned by Indians. App. 196.⁷⁰ However, so pervasive is the Bureau's control that one observer has concluded that:

"Although the normal expectation in American society is that a private individual may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government."⁷¹

The Indian Preference Statutes carefully parallel the jurisdictional boundaries of the Bureau. The Bureau supervises only those Tribes and reservations recognized by the Federal Government.⁷² In turn, only members of Federally-recognized Tribes qualify for preference. App. 200. Furthermore, Tribal members are eligible for a preference only at the Bureau of Indian Affairs and the Indian Health Service, and in a very limited way at other bureaus within the Department of the Interior (where Indian programs are involved). App. 197. A Tribal member loses preference by transferring to another agency of the Federal Government.

The Bureau—like the Tribes, and the sweeping power of Congress to regulate their affairs—is *sui generis*. The District Court erred in confusing this case with cases not in-

⁷⁰ See, R. Bennett & F. Hart, *Felix S. Cohen's Handbook of Federal Indian Law* 287-346 (1942 ed.; Univ. N.M. reprint 1971).

⁷¹ Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1820 (1968).

⁷² Although most Tribes are recognized, certain Tribes have never come under the Bureau's jurisdiction while others have been "terminated" by the Federal Government. Members of non-recognized Tribes do not receive preference. App. 200. A recent list of the Tribes and Bands which have been terminated is attached to: Personnel Management Letter No. 73-23 (213), Bureau of Indian

volving the unique Federal-Tribal relationship. Furthermore, as the next section establishes, Congress had a reasonable governmental purpose in attempting to staff the Bureau of Indian Affairs with the people whose affairs it controls.

B. Indian Preference Statutes Further the Purpose of Providing Indian Tribes With a Means of Self-Government.

1. Congress Enacted the Indian Preference Statute of 1934 to Ensure That Tribal Indians Would Govern the Agency That Governs Them.

The provisions of the Indian Preference Statute of 1934 reflect a Congressional determination that the obligations of the United States to the Indian Tribes will be met best if the Tribes administer their own affairs.⁷⁵ Representative Howard, one of the sponsors of the legislation, declared that:

"Indian progress . . . will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians."⁷⁶

John Collier, Commissioner of Indian Affairs, explained:

"[T]his bill is designed not to prevent the absorption of Indians in white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measure of self-government in their own affairs."⁷⁷

Affairs, U.S. Dept. of the Interior (Oct. 5, 1973). The termination program is described in M. Price, *Law and the American Indian* 582-86 (1973).

⁷⁵ *Senate Hearings* 19, 256, 259; 78 Cong. Rec. 11123, 11125, 11729, 11731 (1934). See generally Krieger, *Principles of Indian Law and the Act of June 18, 1934*, 3 Geo. Wash. L. Rev. 279 (1935).

⁷⁶ 78 Cong. Rec. 11731 (1934).

⁷⁷ *Senate Hearings* 17.

This Court and the lower Federal courts have recognized and approved the policy of self-determination by the Indian Tribes."¹⁶

It cannot be said that Congress' decision to staff the Bureau of Indian Affairs with Indians was "purely arbitrary," lacked "some reasonable basis," or in any way amounted to an abuse of its wide discretion in regulating Indian affairs." Congress was shocked by the ineptitude, incompetence, and oppressiveness of the Bureau," and the

¹⁶ See, e.g., *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Not satisfied solely with centralized government of Indians [by an Indian agency], it [Congress] encouraged Tribal governments and courts to become stronger and more highly organized"); *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 716 n.20 (1943) ("These and other recent statutes reflect a change in policy, the theory of which is that Indians can better meet the problems of modern life through corporate, group, or Tribal action, rather than as assimilated individuals."); *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883) ("The pledge to secure to these people . . . an orderly government, by appropriate legislation . . . necessarily implies . . . the highest and best of all, that of self-government; the regulation by themselves of their own domestic affairs . . ."); *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956, 960 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971) ("[The Indian Preference Statute of 1934] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian.").

¹⁷ See *Perrin v. United States*, 232 U.S. 478, 486 (1914).

¹⁸ Senator King commented:

"The Indian Bureau has been incompetent, oppressive, and too indifferent to the needs of the Indian . . . the civil service as applied to the Indians has built up an inefficient and incompetent bureaucracy, under which the progress of the Indians has been interfered with and the individual, economic and moral development has been impeded . . . I hope that a new deal shall come to the Indians; that the Indian Bureau will be reformed and rational and sound policies put into operation." 78 Cong. Rec. 11126-27 (1934).

status of the Indian employees within it." Moreover, the Indian Preference Statute of 1934 was perfectly consistent with previous Congressional legislation dating back a full century.⁸⁰

The reasonableness of the Indian Preference Statutes is also demonstrated by their consistency with the legal status of the Tribes as domestic, dependent nations and the concept of Tribal sovereignty.⁸¹ The Tribal Indians may govern themselves "save when Congress expressly or clearly directs otherwise."⁸² The Indian Preference Statutes confirm that right, and provide a centralized instrument, in the form of the Bureau of Indian Affairs, for exercising the right.

⁸⁰ Representative Howard commented:

"The great majority of these positions held by Indians are in the lower salary grades, such as clerks, matrons, cooks, boys' and girls' advisors, and so forth. Considering the higher and technical positions, there are, for example, only eight Indian forecasters in a total forecast personnel of 102; 250 teachers in a total teaching force of 966; 21 nurses out of a total force of 345 nurses; only 8 Indian superintendents out of a total of 102. . . ." 78 Cong. Rec. 11729 (1934).

⁸¹ The Government Brief analyzes in detail the legislative history of the Indian Preference Act of 1934 and its predecessors. The need for additional legislation was explained by Commissioner Collier:

" . . . let me give you some startling facts. Look at the employment of the Indians in the regular Indian Service. For years and years it has been common belief that it was time to get Indians in the Indian service. I know that is a policy of the present administration. But what are the facts? In 1900 there were more Indians in the regular Indian Service in proportion to the total number than there are today . . . So, we have this bill to enable the Indian to run his own affairs, to help himself, and to give him the mere privilege of getting a chance to do his own work in the employ of the government." *House Hearings* 38.

⁸² See Comment, *The Indian Battle for Self-Determination*, 58 Cal. L. Rev. 445, 447-52 (1970).

⁸³ *United States v. Quiver*, 241 U.S. 602, 606 (1916).

Had Congress enacted one of the many proposals suggested during the last century to establish a wholly separate Indian state or territory,³³ there would be no question that the government of such a territory could be limited to its inhabitants. No constitutional issue is raised by the fact that Indian Tribes are scattered on reservations across the United States, and that the Bureau of Indian Affairs must act as a Federal agency rather than as a territorial government. The power of Congress to regulate Tribal matters is not diminished by the dispersion of the Tribes.³⁴

Neither this Court, nor any other court except the court below, has ever held that the Fifth Amendment guarantees non-Indians the right to participate in Indian self-government. Indeed, such a "right" would be a contradiction in terms, and would destroy forever the hope that the Tribes "might become a self-supporting and self-governed society."³⁵

2. The Indian Preference Statutes Do Not Create Unjustifiable Racial Discrimination.

Appellees' reliance on *Bolling v. Sharpe*, 347 U.S. 497 (1954), is misplaced; and the District Court's conclusion that the Indian Preference Statutes apply to "Indians generally"³⁶ is totally incorrect. The differential treatment provided for in the Indian Preference Statutes is not based solely, or even primarily, on race. Preference is available only to members of federally-recognized Tribes. Both the

³³ See M. Price, *Law and the American Indian* 69-84 (1973).

³⁴ *Worcester v. Georgia*, 31 U.S. 350, 398-99, 6 Pet. 515, 589-91 (1832) (McLean, J., concurring).

³⁵ *Ex parte Crow Dog*, 109 U.S. 556, 569 (1883).

³⁶ JSA, App. B at 35; 359 F. Supp. 585, 591 (D.N.M. 1973).

foregoing argument and the testimony in the court below establish this distinction beyond doubt.

Furthermore, as the arguments in the preceding subsections make clear, the differential treatment is necessary to accomplish an important governmental purpose which has been approved by Congress and this Court. The Indian Preference Statutes are a reasonable means by which the members of Indian Tribes, those unique dependent nations recognized by the Constitution, can exercise a degree of control over their own destinies.

The Constitution grants Congress the power to enact special legislation for Indian Tribes.⁸⁷ It has exercised this power on so many occasions that its statutes fill an entire title of the United States Code: Title 25. The courts have upheld the constitutionality of statutes that extended benefits to Indians which were unavailable to non-Indians.⁸⁸ With the exception of the court below, no court has ever held one of these statutes to violate the Fifth Amendment because it failed to extend benefits to non-Indians as well.

To legislate for the Indian Tribes, Congress has the power to distinguish Indians from non-Indians.⁸⁹ To do so, Congress must necessarily use a criterion of race:

"Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race.' Indians can only be defined by their race."⁹⁰

⁸⁷ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Bd. of County Comm'rs v. Seber*, 318 U.S. 705 (1943); see p. 22 *supra*.

⁸⁸ See, e.g., *Bd. of County Comm'rs v. Seber*, 318 U.S. 705 (1943); *Simmons v. Eagle Seelatssee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966).

⁸⁹ See *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

⁹⁰ *Simmons v. Eagle Seelatssee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966).

The footnote accompanying the passage just quoted amplifies the necessity for a criterion of race when Congress deals with the Indians:

"A logical application of plaintiffs' position respecting the unconstitutionality of a 'criterion of race' would cast doubt on all such legislation. Defendants have made this point as follows: 'Let us assume that every statute which has race as the basis of its classification violates the Fifth Amendment as alleged by the Plaintiffs. If this be so, then every statute relating to Indians, qua Indians, is unconstitutional.'"²¹

This Court has indicated that not all classifications based on race are constitutionally impermissible.²² Furthermore, preference in employment for reasons other than competitive merit is an accepted practice.²³ Because the Indian Preference Statutes rest upon unique constitutional provisions and Congressional powers, because they are vital to an important governmental purpose, because the differential treatment they provide is based primarily on Tribal membership rather than race, and because a race criterion is an unavoidable necessity in Indian legislation, this Court should uphold their constitutionality.

3. The Indian Preference Statutes Continue to Fulfill a Reasonable Governmental Purpose.

The goal of the 1934 Indian Preference Statute has not been achieved. The deplorable condition of life on the reservation has not improved. Indians have about two-thirds the life expectancy, receive about half as much edu-

²¹ *Simmons v. Eagle Seelatsee*, *supra*, 244 F. Supp. at 814 n.13.

²² *Loving v. Virginia*, 388 U.S. 1, 11 (1967). See also *Contractors Ass'n v. Sec'y of Labor*, 442 F.2d 159, 176-77 (3d Cir. 1971).

²³ See, e.g., *Elder v. Brannan*, 341 U.S. 277 (1951); *Hilton v. Sullivan*, 334 U.S. 323 (1948).

cation, and earn between one-third and one-fourth as much income as other citizens." Their health is extremely bad and they lack decent housing." Furthermore, they often cannot speak English and "have cultural patterns that impede dealings with non-Indian agencies." 22

"Indian reservations, as alienated socially as urban ghettos and far more isolated geographically, are the purest examples of underdeveloped enclaves within American society: infant mortality is seventy percent higher than the national average; almost half the Indian labor force is unemployed; the predominant attitude is one of hopelessness." 23

The Government today recognizes, as it did in 1934, that self-determination is the only way in which the problems of the American Indian may be solved. The President observed in 1970:

"It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacity and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come . . . to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." 24

²² Message from the President of the United States, H.R. Doc. No. 272, 90th Cong., 2d Sess. 1-2 (1968).

²³ Sclar, *Participation by Off-Reservation Indians in Programs of the Bureau of Indian Affairs and the Indian Health Service*, 33 Mont. L. Rev. 191, 220 (1972).

²⁴ *Id.*

²⁵ Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1838-39 (1968).

²⁶ Message from the President of the United States, H.R. Doc. No. 91-363, 91st Cong., 2d Sess., 116 Cong. Rec. 23137 (1970).

But the Tribes are not much closer now than they were in 1934 to realizing the self-determination intended by Congress. The President continued:

"... the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials in Washington, D. C., rather than to the communities they are supposed to be serving

"Of the Department of Interior's programs directly serving Indians, for example, only 1.5 percent are presently under Indian control. . . . The result is a burgeoning federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale."⁹⁹

The programs of the Bureau of Indian Affairs continue to be unresponsive to Indian needs; and Indian employment within the Bureau has barely improved over the last thirty years.¹⁰⁰ More significantly, there are still comparatively few Indians in supervisory, technical, administrative and management positions in the Bureau.¹⁰¹ The expectation that Indians would "rise to the higher administrative and technical posts"¹⁰² of the Bureau was thwarted by the restrictive interpretation of the Preference Statutes taken by the Executive Branch.¹⁰³ However, the recent decision in *Freeman v. Morton*,¹⁰⁴ extending preference to promo-

⁹⁹ *Id.*

¹⁰⁰ Exhibits submitted by the defendants and the testimony of Mr. Raymond Gunter, Personnel Officer, BIA, show that the status of Indian employees within the Bureau has barely changed. For example, in 1941, there were more Indian employees proportionately in the Bureau than in 1969. See Exhibit F, App. 113.

¹⁰¹ See Exhibit E, App. 111.

¹⁰² 78 Cong. Rec. 11731 (1934) (remarks of Rep. Howard).

¹⁰³ App. 180-82.

¹⁰⁴ JSA, App. D. The decision is discussed in greater detail in the Statement of the Case, p. 6 *supra*.

tions, reinstatements and reassignments, will undoubtedly hasten the elevation of Indians to higher-level positions in the Bureau.¹⁰⁵ Consequently, Tribal Indians will be able to exercise greater control over their own lives.

The legislative purpose behind the Indian Preference Statutes remains a vital governmental purpose today. If the Bureau implements the strong preference policy envisioned by Congress, the quality of Indian life will improve and Indian employees of the Bureau will be able to contribute more to the self-determination of their people. Just two years ago the President reaffirmed the purpose underlying the Indian Preference legislation:

"I again urge the Congress to join in helping Indians to help themselves in fields such as health, education, the protection of land and water rights, and economic development. We have talked about injustice to the first Americans long enough. As Indian leaders themselves have put it, the time has come for more rain and less thunder."¹⁰⁶

¹⁰⁵ App. 192, 195.

¹⁰⁶ State of the Union Address, H.R. Doc. No. 201, 92d Cong., 2d Sess., 118 Cong. Rec. S. 155 (daily ed., January 20, 1972).

CONCLUSION

The District Court, we submit, erred on an issue of great public importance. Its decision, if permitted to stand, will block implementation of a policy laid down by Congress on numerous occasions, beginning in 1834, and designed to allow the Indian a measure of self-determination. For the reasons set forth in this Brief, the decision should be reversed.

Respectfully submitted,

STUART J. LAND

1229-19th Street, N.W.

Washington, D.C. 20036

HARRIS D. SHERMAN

1130 Capitol Life Center

Denver, Colorado 80203

Attorneys for Intervenor-

Appellant Amerind

Of Counsel:

ARNOLD & PORTER

PATRICK F. J. MACROBY

ROBERT HENRY WOOD

1229-19th Street, N.W.

Washington, D.C. 20036

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-362

ROGERS C. B. MORTON, ET AL., APPELLANTS

v.

C. R. MANCARI, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. A) is reported at 359 F. Supp. 585 (D. N.M.).

JURISDICTION

The judgment of the district court was entered on June 1, 1973. A notice of appeal to this Court was filed on June 29, 1973. The Court noted probable jurisdiction on January 14, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Act of 1972 repealed, by implication, the Acts of Congress giving Indians preference in employment in the Bureau of Indian Affairs of the Department of the Interior.

2. Whether the Acts of Congress giving Indians preference in employment in the Bureau of Indian Affairs violate the Due Process Clause of the Fifth Amendment.

STATUTES INVOLVED

The Indian Reorganization Act of 1934, Section 12, 48 Stat. 986, 25 U.S.C. 472, provides:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.¹

¹ Other Indian preference statutes, presumably invalidated by the judgment below, are:

Act of June 30, 1834, Section 9, 4 Stat. 737, 25 U.S.C. 45, provides:

In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if

Section 717 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, Section 11, 86 Stat. 111, 42 U.S.C. (Supp. II) 2000e-16, provides in relevant part as follows:

such can be found, who are properly qualified for the execution of the duties.

Act of July 4, 1884, Section 6, 23 Stat. 97, 25 U.S.C. 46, provides in relevant part:

Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

Act of August 15, 1894, Section 10, 28 Stat. 313, 25 U.S.C. 44, provides:

In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

Act of June 7, 1897, Section 1, 30 Stat. 83, 25 U.S.C. 274, provides:

The Commissioner of Indian Affairs shall employ Indian girls as assistant matrons and Indian boys as farmers and industrial teachers in all Indian schools when it is practicable to do so.

Act of June 25, 1910, Section 23, 36 Stat. 861, 25 U.S.C. 47, provides:

So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

These statutes have, for practical purposes, been replaced, with respect to employment, by the broader provisions of 25 U.S.C. 472.

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

The appellees are non-Indian employees of the Bureau of Indian Affairs ("BIA") who complain that they were denied promotion or opportunity for further training because Indians were accorded preference over them. They brought this action on their own behalf and for the class of similarly-situated non-Indians to enjoin the Secretary of the Interior and certain named officials of the BIA from enforcing the Indian preference laws (App. 22-25).

The appellees claimed that the preference laws deprive non-Indian employees of the BIA of property without due process of law in violation of the Fifth Amendment; that they have in effect been repealed by the Equal Employment Opportunity Act of 1972; and that, in any event, they are being interpreted too broadly by the Secretary in that the laws were intended to apply only to initial hiring, not promotions or reassignments for training (App. 23-24). The three-judge district court, convened pursuant to 28 U.S.C. 2282, held that the Indian preference laws had been tacitly repealed by the Equal Employment Act of 1972. While stating that it "could well" do so, the court expressly did not hold the laws unconstitutional (J.S. App. 23).² The court's judgment "permanently enjoin[s] [the appellants] from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian * * *" (J.S. App. 24). On August 16, 1973, Mr. Justice Marshall stayed the judgment of the district court, pending this Court's disposition of this appeal (J.S. App. 27).

SUMMARY OF ARGUMENT

The Equal Employment Opportunity Act of 1972 did not, either specifically or by implication, repeal the long-standing statutes giving a preference to In-

² In light of its holding that the preference laws had been repealed, the court did not comment on the scope of their enforcement.

dians (of federally recognized tribes) in the federal Indian service which serves those tribes.

The Indian preference statutes, which are based on participation by the governed in the governing agency, rather than race, are an important part of federal Indian policy. In this century, they have been strengthened by Congress and enforced more vigorously by the Executive. There is no conflict between generally forbidding racial discrimination in employment, and a preference for Indians in the Indian service.

The 1972 Equal Employment Opportunity Act was an amendment to the 1964 Civil Rights Act which expressly preserved the validity of giving an employment preference to Indians in the service of their people. The purpose of the 1972 Act was to provide new means of enforcing existing rights, and the Act was not intended to make any substantive change in those rights. To hold that the 1972 Act repealed the longstanding Indian preference laws is to give it a meaning not intended by Congress.

Finally, the Indian preference laws are constitutional. They apply only to Indians of tribes whose affairs are administered by the Bureau of Indian Affairs. They therefore are not racial legislation, but statutes which foster Indian self-government and self-determination. They also assure that job opportunities on Indian reservations are made available to Indians. They are well within the congressional authority to legislate for the Indian tribes as an historically distinct, constitutionally-recognized people, to

whom the federal government has assumed special obligations in the exercise of its commerce, treaty and war powers.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING A REPEAL BY IMPLICATION OF A SPECIAL, LONG-STANDING CONGRESSIONAL POLICY IN THE ABSENCE OF A SHOWING OF LEGISLATIVE INTENT TO REVERSE THAT POLICY

A. The affording of preferences to tribal Indians in employment in the Indian service is an important congressional policy in support of the federal government's trust responsibilities to the Indian tribes.

1. *During the century preceding the enactment of the 1934 Indian Reorganization Act, federal law consistently provided for certain preferences for the employment of Indians in the provision of Indian service.*

The early dealings between the United States and the Indian tribes were through treaties, many of which specifically promised that the government would undertake certain services on the reservations.¹ The treaties occasionally provided a preference to Indians in doing some of the required work.² When

¹ See, e.g., Treaty with the Choctaws of October 18, 1820, 7 Stat. 210, Arts. 6 and 7; Treaty with the Chippewas of August 5, 1826, 7 Stat. 290, Art. 6; Treaty with the Navahos of June 1, 1869, 15 Stat. 667, Art. VI.

² See United States Department of the Interior, *Federal Indian Law*, p. 532 *et seq.* (1958). See also Treaty of March 11, 1863, with the Chippewas, 12 Stat. 1249, 1251, Art. XI, providing "[w]henever the services of laborers are required upon the reservation, preference shall be given to full or mixed bloods, if they shall be found competent to perform them".

the Bureau of Indian Affairs was reorganized in 1834, its organic Act^{*} provided for the hiring of interpreters, blacksmiths, farmers, mechanics and teachers for the various Tribes as required by treaty. It also specified, in a provision now codified as 25 U.S.C. 45:

In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.*

Thus from the early history of the Bureau of Indian Affairs a preference for the employment of Indians was considered part of its broad purpose to provide:

^{*} Act of June 30, 1834, 4 Stat. 735. The succession of agencies used in the government administration of Indian affairs prior to 1834 is discussed in *Federal Indian Law, supra*, at 215-218. Under the 1834 Act the Bureau (referred to in the Act as the Department of Indian Affairs) remained in the War Department. In 1849 it was transferred to the Department of the Interior. Act of March 3, 1849, 9 Stat. 395. See *Federal Indian Law, supra*, at 218-219. The Bureau has subsequently remained in the Department of the Interior except that the Indian Health Service was transferred to the Department of Health, Education, and Welfare in 1954, Act of Aug. 5, 1954, 68 Stat. 674, 42 U.S.C. 2001. In 1929 the then Secretary of the Interior required that the Bureau henceforth be referred to as "the Indian Service" apparently because "the word 'bureau' was in bad repute" (*Federal Indian Law, supra*, at 221).

^{*} Act of June 30, 1834, Section 9, 4 Stat. 737.

* * * a system of laws and of administration
 * * * that shall, with a due regard to the rights of our own citizens, meet the just expectations of the country in the fulfilment of its proper and assumed obligations to the Indian tribes. [H. Rep. No. 474, 23rd Cong., 1st Sess. 1 (1834).]

The subsequent Report of the Secretary of War mentioned that the preference requirement for native teachers had received attention and that Indian agents were instructed to explain the preference to the Tribes (1 Sen. Doc. No. 1 (1834), 237, 256).

After some fifty years, congressional concern for the Indian employment preference was reaffirmed in the Indian Department Appropriations Acts of May 17, 1882, 22 Stat. 88, and of July 4, 1884, 23 Stat. 97, both now codified in 25 U.S.C. 46 as follows:

Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

The Appropriations Act of August 15, 1894, Section 10, 28 Stat. 313, codified as 25 U.S.C. 44, reiterated the Indian preference for all employment in the Indian Bureau and expressed apparent congressional concern that the mandatory preference was not being enforced:

In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service.

And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

While there was little congressional debate on the Indian preference provisions themselves during the nineteenth century,¹ a number of themes appear in general debate and committee reports concerning Indian appropriations and other Indian affairs which suggest the apparent legislative purposes in enacting the preference statutes.²

¹ The preference clause in the 1882 and 1884 appropriations Acts was added by the Senate Committee on Appropriations to H.R. 4185, 47th Cong., 1st Sess. (1882). This amendment was accepted without debate by Congress. See 13 Cong. Rec. 2372, 2653 (1882). The following year the appropriation bill was passed without mention of Indian preference. However, in 1884 the preference reappeared as part of Sec. 6 of H.R. 6092, 48th Cong., 1st Sess. (1884), and was passed without comment. That bill was amended on the floor of the House (15 Cong. Rec. 2573 (1884)) by adding to an appropriation for transportation of goods for the Sioux Tribes, the clause: " * * * and in this service Indians shall be employed wherever practicable." This amendment was approved (23 Stat. 87) and reappeared in the appropriations Act of the next session (23 Stat. 375).

Mention of an Indian preference was omitted from the annual Indian Department appropriation Acts until the passage of the Act of August 15, 1894, 28 Stat. 313, codified as 25 U.S.C. 44. This provision was introduced as part of H.R. 6913, 53rd Cong., 2d Sess. (1894), the Indian appropriation bill. It received no comment in the House Report accompanying the bill (H. Rep. No. 802, 53rd Cong., 2d Sess. (1894)), and was mentioned only once in debate on the House floor in conjunction with the need for interpreters (26 Cong. Rec. 6076, June 9, 1894).

² These themes reappear, with a shift in emphasis toward self-determination, in the twentieth century in discussions

One of these themes was the duty of Congress to insure the education of Indians in the skills of the majority culture. The legislators' prime interest was that Indians be trained to support themselves in "civilized" occupations, and to acquire the skills of self-government in the white man's world.* To this end practical education was eulogized, and the educational value of government employment was stressed.¹⁰

Indian poverty is a related theme. As the Indian's traditional economic system disintegrated with the loss of vast areas of his land, the poverty of the unemployed Indian became a national scandal. Government service in their own behalf was proposed as one approach to ameliorating Indian unemployment.¹¹ There was also repeated expression of congressional concern over the plight of Indian youths who were educated at eastern schools, and returned to the reservations only to find their training useless and all skilled jobs filled by non-Indians.¹²

surrounding the 1934 Indian Reorganization Act, which contained the broadest of the Indian preference statutes. See pp. 13-20, *infra*.

* See 13 Cong. Rec. 2416-2418, March 30, 1882 (Sen. Hoar); 42 Cong. Rec. 1699, Feb. 6, 1908 (Rep. Smith).

¹⁰ See Report to the Secretary of War, 11 Congressional Debates, Appendix, 23d Cong., 2d Sess. (1834), p. 41 *et seq*; 13 Cong. Rec. 2374, March 29, 1882 (Rep. Beck).

¹¹ 13 Cong. Rec. 2459, March 31, 1882 (Sen. Allison); 42 Cong. Rec. 1695, February 6, 1908 (Rep. Sherman); 45 Cong. Rec. 2095, February 18, 1910 (Rep. Stephens).

¹² See, e.g., 13 Cong. Rec. 2457, March 31, 1882 (Sen. Teller); 13 Cong. Rec. 2458, March 31, 1882 (Sen. Hoar); 26

The tension between the ideals of Indian self-government (or integration into the dominant society) and the actuality of pervasive subjection of tribal Indians to the powers of an often insensitive Indian service also runs through congressional debates, culminating in the Indian Reorganization Act of 1934. See, *e.g.*, 26 Cong. Rec. 6249-6251, June 13, 1894. One way of decreasing this tension and improving relations between the government and the tribes was thought to be the employment of Indians in the Indian Service because they would be best qualified to appreciate Indian needs, most likely to be sympathetic to Indian problems, and least likely to further the humiliation which comes from dependency on strangers for the necessities of life.¹³

Finally, there was congressional concern during this period about the role of non-Indian employees in the Indian Service. The House Report on the 1834 Act, H. Rep. No. 474, 23rd Cong., 1st Sess. 78, 98 (1834), contains a letter from Indian Commissioners who worked on resettlement of tribes beyond the Mississippi River, warning of the evil effects of whites, including governmentally licensed trading agents, living among the Indians. And concern was repeatedly expressed in Congress about the excessive hiring

Cong. Rec. 6077, June 9, 1894 (Rep. Cannon); 26 Cong. Rec. 6076, June 9, 1894 (Rep. Holman).

¹³ See, *e.g.*, 42 Cong. Rec. 1705, February 6, 1908 (Rep. Olmsted).

of non-Indian agents, inspectors, and commissioners who either performed no service for Indians or exploited them."¹⁴

None of these themes and concerns can be shown to have directly resulted in the passage of any of the Indian preference Acts. Yet, together, they suggest that the Acts reflect a pervasive congressional concern that some form of preference for Indian employment in the performance of services for Indians and the management of Indian affairs was necessary to advance the welfare of the Indian tribes and to eliminate serious problems that had developed in the administration of the Indian Service.

2. *The Indian Preference Section of the 1934 Indian Reorganization Act revitalized and strengthened the congressional policy that, to the extent practicable, Indian services should be performed by Indians and Indian affairs should be managed by Indians.*

Cohen describes the Indian Reorganization Act of 1934 as "probably equaled in scope and significance only by the legislation of June 30, 1834 [which reorganized the Department of Indian Affairs] and the General Allotment Act of February 8, 1887 * * *"¹⁵

¹⁴ See 15 Cong. Rec. 2522-2532, 2559-2565, Apr. 2 and 3 1884, especially remarks of Rep. Throckmorton at 2523; 26 Cong. Rec. 6078-6080, June 9, 1894, especially remarks of Rep. Holman at 6078.

¹⁵ Department of the Interior, *Handbook of Federal Indian Law*, p. 84 (1942); see also *Federal Indian Law*, *supra*, p. 128.

It is Section 12 of the Indian Reorganization Act that the three-judge district court held to have been tacitly repealed. The section provides:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

This provision is an integral part of the Act's three-pronged design to end the loss of Indian land by eliminating the allotment policy; to end the destruction of Indian self-government and self-respect by fostering, rather than discouraging, tribal governments; and to end abuses in, and the demeaning effect of, federal supervision of Indian affairs by giving Indians dominance in the regulation of their own affairs (see pp. 16-21 *infra*).

The Indian Reorganization Act began as an administration bill in the House of Representatives, H.R. 7902, 73rd Cong., 2d Sess. (1934), designed to accomplish a "new deal" for Indians. 78 Cong. Rec. 7807. The original bill proposed to allow Reservation Indians to set up federally chartered communities which would be run by their residents and would progressively replace the Bureau of Indian Affairs as

the government (including source of government services and jobs) on the reservations. The governments of the Indian communities would be staffed by Indians, under standards set by the Secretary of the Interior.¹⁶ The role of the BIA would be greatly reduced.

One of the reasons for the institution of chartered communities was that the enactment and administration of civil service laws had greatly diminished Indian participation in the BIA, which governed Indian communities:

The bill admits qualified Indians to the position[s] in their own service.

Thirty-four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total of positions, was greater than it is today.

The reason primarily is found in the application of the generalized civil service to the Indian Service, and the consequent exclusion of Indians from their own jobs.¹⁷

In support of the bill, the Committee heard, among others, a representative of the Blackfeet Tribe who testified that the tribal Indians—

¹⁶ Hearings before the House Committee on Indian Affairs, on Readjustment of Indian Affairs, H.R. 7902, 73rd Cong., 2d Sess. (1934) (hereinafter cited as "House Hearings"), pp. 1-7.

¹⁷ Memorandum of Explanation to the Committees on Indian Affairs by John Collier, Commissioner of Indian Affairs, House Hearings, p. 19.

* * * can see their boys and girls going to these schools there on the reservation and they are being turned out of those schools with nothing to do, no place to go; and yet they are capable of filling positions there, and they are not given those positions because you have this Civil Service law which prevents them from qualifying for those positions. [House Hearings, 248 (May 1, 1934).]

By the last day of the House hearings it had become apparent that the committee would not accept the federally chartered community portion of the bill and the almost total elimination of the BIA.¹⁸ Opponents of the bill then questioned Commissioner Collier on what he considered to be the basic elements of the bill; he emphasized the importance of employing Indians in the Indian Service:

Then we feel very strongly that some readjustment of the civil service must be arranged for so that Indians will not be excluded if they are fit. They are discriminated against now under the present civil service, and it cannot be helped. * * * It will require some law. [House Hearings, 491 (May 8, 1934).]

In rewriting the bill the committee was faithful to the purpose of the bill but changed the method of accomplishing that purpose. Rather than setting up federal communities and virtually eliminating the role of the BIA, it strengthened tribal government while retaining the active role of the BIA in administration and in rendering municipal service—but

¹⁸ House Hearings, 492-497 (May 8, 1934).

with provision for an Indian preference in the BIA, including an express exception to the civil service laws. The House Committee on Indian Affairs Report on H.R. 7902 explained the preference provision as follows:

It liberalizes the present rigid civil-service requirements so as to admit qualified Indians to the Indian Service, which is largely paid for by the Indians themselves. [H. Rep. No. 1804, 73rd Cong., 2d Sess., 6 (1934).]

In the House, the Indian preference section was fully debated. The bill's sponsor, Representative Howard, defended the section as an essential part of the new program to return some measure of self-government and economic independence to the Indians, analogizing the Indian Service to municipal services normally provided by local governments:

The Indians have not only been thus deprived of civil rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil service. In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions; and even if there were such training, the Indians would have to compete under existing law, on equal terms with multitudes of white applicants. * * * The various services on the

Indian reservations are actually local rather than Federal services and are comparable to local municipal and county services, since they are dealing with purely local Indian problems. It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so. [78 Cong. Rec. 11729 (1934).]"

Congress recognized that the Indian preference policy could well result in making the Indian Service largely an Indian-staffed organization. One of the bill's opponents read the following remarks by Commissioner Collier on the subject into the record:

Mr. Collier. * * * However, we must not blind ourselves to the fact that the effect of this bill if worked out would unquestionably be to replace white employees by Indian employees. I do not know how fast, but ultimately it ought to go very far indeed. [78 Cong. Rec. 11737 (June 15, 1934) (Rep. Carter).]

Representative Howard, on the other hand, referred enthusiastically to the prospect of a predominantly Indian-staffed Indian Service:

I have already spoken of the difficulty which Indians experience in meeting the civil-service requirements for entering the Indian Service. It

¹⁹ For a similar statement in floor debate in the House, but by a Representative who otherwise opposed the bill, see 78 Cong. Rec. 9270 (May 22, 1934) (Rep. Hastings).

should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians. This does not mean a radical transformation overnight or the ousting of present white employees. It does mean a preference right to qualified Indians for appointments to future vacancies in the local Indian field service and an opportunity to rise to the higher administrative and technical posts. [78 Cong. Rec. 11731 (June 15, 1934).]"

"The Senate Hearings and debates are to the same effect. In the Senate Hearings on the revised House bill (redesignated S. 3645), the provision on Indian Civil Service was attacked by Luther Seward, President of the National Federation of Federal Employees. Hearings before the Senate Committee on Indian Affairs, on S. 2755 and S. 3645, 73d Cong., 2d Sess. (1934) (hereafter cited as "Senate Hearings"), p. 256. It was defended by the Committee Chairman, Senator Wheeler, on several grounds:

You are discriminating at the present time. We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States because these Indians own this property. It belongs to them. What this policy of the Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service

President Roosevelt, in a letter supporting the bill sent to Senator Wheeler and Representative Howard, stated:

Indians throughout the country have been stirred to a new hope. They say they stand at the end of the old trail. Certainly, the figures of impoverishment and disease point to their impending extinction, as a race, unless basic changes in their conditions of life are effected.

I do not think such changes can be devised and carried out without the active cooperation of the Indians themselves.

The Wheeler-Howard Bill offers the basis for such cooperation. It allows the Indian people to take an active and responsible part in the solution of their own problems. [H. Rep. No. 1804, *supra*, at 8.]

In sum, the Indian preference provision was a thoroughly analyzed, thoroughly debated integral step in the accomplishment of the goal of self-determination for Indians and the ending of well documented discrimination against them caused by, among other things, the application of ordinary civil service rules to the Indian Service.

is concerned because of the fact that it has discriminated against Indians. [Senate Hearings, *supra*, 256.]

See also Senate Hearings at 257-259, especially Senator Norbeck's statement at p. 259: "I think we have utterly fallen down in the present system. The Indian has been excluded. The reservation has been filled up with white people who live off the Indians." For floor debate, see, e.g., 78 Cong. Rec. 11123 (June 12, 1934) (Sen. Wheeler).

3. *In light of their limited application, the Indian preference laws serve a non-discriminatory purpose and are not an obstacle to the elimination of racial discrimination in employment.*

a. The Indian preference laws are not applied by the BIA to all persons of Indian racial origin. The preference is limited to persons of one-quarter or more Indian blood of federally recognized tribes (App. 194), that is, tribes whose affairs are subject to BIA supervision. The preference thus is not in truth a racial preference, but a preference for those persons whose affairs are governed by the BIA to participate in its activities (see *infra*, pp. 30-31). A full blooded Indian who is not of a federally recognized tribe, e.g., a member of a terminated tribe or of a Canadian or Mexican tribe, has no preference.

The preference laws have had an important effect in fostering the objective of self-government through participation in the Indian Service. In 1934, there were approximately 2,100 Indians employed by BIA out of about 6,500 employees, or about 34 per cent (App. 190). By 1972, under the operation of the 1934 Act, the number had grown to 57 percent of a total employment of approximately 16,500 (App. 191). However, until recently, the government applied the preference only to initial hiring in the Indian Service, and not to promotions (App. 69, 181-182); Indian employees therefore tend to occupy the lower paying, less policy-oriented jobs (App. 40). With the present, more vigorous application of these laws (which apparently precipitated this suit, see e.g., App. 137) considerable progress can be made in

giving Indians the opportunity to make the decisions as well as to do the work needed for their own betterment as intended by the 1934 Act (see, *e.g.*, App. 199).

b. As the government has become increasingly involved in securing the civil rights of all citizens, the Indian preference laws have been regarded by both the Executive and Congress as consistent with that aim, not as detrimental to it. Accordingly, the Civil Service rules since the passage of the Indian Reorganization Act have shown positions in the Bureau of Indian Affairs as excepted service. See Ex. Order 7423, July 26, 1936 1 Fed. Reg. 885-886. With the transfer of BIA health services to the Department of Health, Education, and Welfare the rules now except:

All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood. [5 C.F.R. § 213.3112(a) (7) (1971).]

Public Health Service * * * (8) Positions directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood. [5 C.F.R. § 213.3116(b) (1971).]²¹

That the Executive has seen no conflict between the government's general obligation to afford equal em-

²¹ The most recent republication of Schedule A appeared on December 13, 1973, in 38 Fed. Reg. 34294.

ployment opportunities and the preference for Indians of regulated tribes in the Indian service, is particularly apparent in Ex. Order 10577, issued by President Eisenhower on November 22, 1954, 19 Fed. Reg. 7521. In Section 301 of that order the President revoked all previous Executive Orders bearing on the Civil Service Rules except Schedules A, B, and C which contained the exception for the Indian Service. In Section 4.2 of the same order President Eisenhower expressly forbade discrimination against any

* * * applicant for a position in the competitive service because of his race, political affiliation or religious beliefs, except as may be authorized or required by law.

As to congressional approval of the preference for Indians in the Indian Service, we pretermitt for the moment a discussion of the Equal Employment Opportunity Act of 1972, which we discuss *infra*, pp. 24-29, and which in our view supports the preference. We note, however, that only three months after the passage of that Act, Congress amended the bi-lingual education provisions of the Elementary and Secondary Education Act which provides funding for the training of teachers for Indian children. Pub. L. No. 92-318, 86 Stat. 335, 20 U.S.C. (Supp. II) 887c(a) and (d), 1119a, and 1221g(a). These amendments *require* that preference be given in the use of these funds for the training of Indians as teachers, and set up a National Advisory Council on Indian Education whose members must, by law, be Indians.

B. The Equal Employment Opportunity Act of 1972 did not expressly or by implication repeal the Indian preference statutes.

The court below held that the Equal Employment Opportunity Act of 1972, by implication, repealed the statutes preferring Indians in the Indian Service. This conclusion attributes to Congress an intention that is not manifested in the terms of the Act or its legislative history. Indeed, the contrary intention is suggested by the Act's legislative background.

The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 111, 42 U.S.C. (Supp. II) 2000e-16, is an amendment to Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.* The 1964 Act, which prohibits discrimination in private employment on the basis of race, color, religion, sex, or national origin, preserved a preference for Indians in employment by Indian tribes or in industries located on or near reservations. Section 701(b), 42 U.S.C. 2000e(b), specifically excludes Indian tribes from the definition of "employer", thereby exempting them from the requirements of the Act. Section 703 (i), 42 U.S.C. Section 2000e-2(i), permits businesses or enterprises located on or near Indian reservations to give preferential treatment in hiring to Indians who live on or near these reservations.

Senator Humphrey, the sponsor of the latter provision, pointed out that it would permit private employers to use a limited version of the Indian preference which had long been a policy in the public sector:

This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians. [110 Cong. Rec. 12723 (June 4, 1964).]²²

Congress was thus reasoning by analogy to the federal Indian preference laws in exempting from the 1964 Act's general prohibition of discrimination a preference for the employment of Indians by Indian tribes or by employers on or near Indian reservations. Especially in light of the fact that the 1964 Act also contained a provision stating a general policy of non-discrimination in federal employment,²³ it is apparent that Congress did not intend the employment policies adopted in the 1964 Act (and carried forward in the 1972 amendment) to affect the special situation of Indian employment in the Indian Service.

b. The Equal Employment Opportunity Act of 1972 does not by its terms repeal the Indian preference laws. The provision of the 1972 Act prohibiting discrimination based on race, which the court below

²² Similarly, Senator Mundt stated that these exemptions for Indians would allow them "to benefit from Indian preference programs now in operation or later to be instituted." 110 Cong. Rec. 13702 (June 13, 1964).

²³ A proviso to Section 701(b) (42 U.S.C. (1964 ed.) 2000e (b)) specifically provided:

it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin * * *

and directed the President to use his existing authority to effectuate this policy. This proviso was repealed, Pub. L. 89-554, 80 Stat. 523, 662 (1966), and reenacted as 5 U.S.C. 7151.

interpreted as repealing the Indian preferences, was not regarded by Congress as creating new rights or changing existing rights. It was intended, instead, as merely a restatement of existing substantive rights in an Act designed to provide new procedures for enforcing those existing rights. This is made quite clear by the House Report:

The prohibition against discrimination by the Federal Government, based upon the due process clause of the fifth amendment to the Constitution, was judicially recognized long before the enactment of the Civil Rights Act of 1964. And Congress itself has specifically provided that it is "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin . . ." (5 U.S.C. 7151 (Supp. II * * * 1965, 1966)) * * *

A critical defect of the Federal equal employment program has been the failure of the complaint process.²⁴

It would be anomalous to conclude that Congress in 1972 repealed the Indian preference laws relating to employment in the BIA (the agency which administers tribal property and is primarily responsible for Indian welfare) while continuing to permit private employers to give such a preference. It is apparent that if Congress had intended to repeal the

²⁴ H. Rep. No. 92-238, 92d Cong., 1st Sess. on H.R. 1746 (1971). See also the remarks of Senator Cranston to the same effect in floor debate at 118 Cong. Rec. S2279 (daily ed., Feb. 22, 1972).

Indian preference statutes in 1972, there would have been some reconsideration of the preference exceptions contained in Sections 701(b) and Section 703(i) of the 1964 Act, which was being amended.

But more to the point, there would have been some mention of the Indian preference statutes themselves, and there is none, in either the legislative history of the 1972 Act or its terms.

Repeals by implication are not favored and are to be avoided in the course of statutory construction unless the statutes are irreconcilable,²² which is certainly not the case here (as the exceptions in the 1964 Act demonstrate). And, specifically, a later general statute, not expressly repealing a prior special statute, will ordinarily not affect the special statute, which remains as an exception.²³

The latter principle of statutory construction is especially applicable here because the Indian preference provision of the 1934 Act is expressly stated to be an exception to the civil service laws, and Section 717 of the 1972 Act, which the court below relied on as repealing the Indian preference law, is essentially

²² See *Posadas v. National City Bank*, 296 U.S. 497, 503; *United States v. Jackson*, 302 U.S. 628, 631; *United States v. Borden Company*, 308 U.S. 188, 198; *Jones v. Mayer Co.*, 392 U.S. 409, 416-417.

²³ *Rodgers v. United States*, 185 U.S. 83, 87-89; *Ex Parte Crow Dog*, 109 U.S. 556, 571. See also *Bulova Watch Company v. United States*, 365 U.S. 753, 758 (general interest provision for overpayment to IRS did not repeal section in IRS Code concerning interest on one type of overpayment); *MacEvoy Co. v. United States*, 322 U.S. 102, 107; *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208.

a civil service law. The bulk of Section 717 grants specific powers to the Civil Service Commission for enforcing rights against discrimination (42 U.S.C. (Supp. II) 2000e-16(b)-(d)). The creation of these new civil service procedures, where applicable, is in no way inconsistent with the continued vitality of 25 U.S.C. 472, which specifically provides for Indian preference in the Indian Service, "without regard to civil-service laws."²⁷

Moreover, the absence of any mention of the Indian preference is also crucial, because, as we have shown (*supra*, p. 21) and show within (*infra*, pp. 30-31), the Indian preference statutes are based on a federal guardianship over *some* Indians tribes, not race or national origin, and the 1972 Act by its terms is directed against discrimination based on race or national origin. The situation which concerned Congress and which led to the passage of Section 717 of the 1972 Act was the *lack* of minority representation in federal employment. Statistics were presented in support of Section 717 which showed that certain minority groups were almost completely absent from the federal employment rolls in all but the lowest levels (118 Cong. Rec. S2280, S2291-S2294 (daily ed., Feb. 22, 1972)). Viewed against this background, it is entirely unrealistic to assume that Congress, in adopting legislation expressly designed to increase

²⁷ As noted earlier, see pp. 16-19, *supra*, the legislative history of the 1934 Act contains abundant expressions of congressional recognition of a need to exempt Indian BIA employees from civil service laws and requirements.

minority representation in government, intended to repeal—without a word—a carefully considered and historical preference designed to enlarge (for non-racial reasons of self-determination) the numbers of Indians in the federal Indian service.

In sum, the lack of any specific language of repeal in the 1972 Act, the inapplicability of the language of the Act, the Act's legislative history, and settled canons of statutory construction all make it clear that Congress did not intend to repeal the Indian preference statutes and did not do so. Moreover, any doubts as to the proper construction or integration of the two statutes should be resolved in favor of Indian interests. *United States v. Celestine*, 215 U.S. 278, 290; *Choate v. Trapp*, 224 U.S. 665, 675; *Squire v. Capoean*, 351 U.S. 1, 7.

II. THE INDIAN PREFERENCE STATUTES ARE CONSTITUTIONALLY VALID

Appellees argue that in giving a preference to Indians in the Indian service the government deprives non-Indians of property without due process of law in violation of the equal protection concept implicit in the due process clause of the Fifth Amendment (Motion to Dismiss 6-8). Similarly the district court suggests (J.S. App. A. 23) that its conclusion that the Indian preference statutes were repealed by implication by the Civil Rights Act of 1972 was occasioned, in part, by its doubt as to the constitutionality of those statutes. In our view, the factual and legal

basis for the preference statutes demonstrate their constitutional validity.

1. The Indian preference statutes are not based on a racial classification and do not discriminate against non-Indians on any illegitimate ground. The BIA is a federal agency whose sole function is the performance of the government's trust responsibility toward the Indian tribes. See 25 U.S.C. 2. See also *Federal Indian Law*, *supra*, 218; Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1819 (1968). The BIA manages and is responsible for all Indian trust land and most activities of the United States government related to federally recognized Indian tribes. The BIA does not exercise responsibility for tribes that have never been under federal supervision (such as some eastern tribes) or tribes whose federal relationship has been terminated by Congress (such as the Klamath Tribe of Oregon). Nor does the BIA have responsibility for persons who racially are Indians but, because they immigrated from Latin America or Canada, are not members of any tribe located in the United States (see App. 194-196, 200-201).

The Indian preference as applied by the BIA has the same limitations. The preference is given only to persons of one fourth or more Indian blood of a tribe under federal supervision.²² The preference statutes

²² This is a somewhat more restrictive definition than that found in the 1934 Indian Reorganization Act, 25 U.S.C. 479.

are thus, as applied by the Bureau of Indian Affairs, a preference for the governed to participate in the governing body, not a racial preference.

2. Moreover, the Indian preference laws are a proper exercise of the long recognized power of Congress to make separate laws for the protection of tribal Indians, including the granting of benefits to Indian tribes and their members that are not available to the populace at large. See, *e.g.*, *Morton v. Ruiz*, No. 72-1052, decided February 20, 1974. Far from offending constitutional principles, that doctrine has its roots in the Commerce Clause of the Constitution (Art. I, Sec. 8, Cl. 3), which grants Congress the power "[t]o regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes," thus singling out Indian tribes as a proper subject for separate legislation. The power of the President, with the advice and consent of the Senate, to make treaties (Art. II, Section 2, Clause 2) is another source of federal constitutional authority for special Indian legislation, much of which began with treaty provisions. See *Worcester v. Georgia*, 6 Pet. 515, 559.

Both this Court and Congress have recognized that in depriving the Indian tribes of most of their land and their traditional ways of supporting themselves, through the exercise of its war and treaty powers, the federal government assumed special duties toward them—duties that have been described as resembling the duties of a guardian to a

ward. *Cherokee Nation v. Georgia*, 5 Pet. 1; *United States v. Kagama*, 118 U.S. 375, 383-384; *Board of Commissioners v. Seber*, 318 U.S. 705, 715-719; see also *Morton v. Ruiz*, *supra*.²⁸

The guardianship principle and the powers concomitant to it (and their constitutional basis as necessary and proper to the exercise of the war and treaty powers) were set forth by the Court in *Board of Commissioners v. Seber*, *supra*, 318 U.S. at 715, upholding against constitutional attack a federal tax immunity granted Indians on land purchased with trust funds:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, *and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic* [emphasis supplied].

²⁸ As to Congress' recognition of these duties, see, e.g., the Snyder Act, 42 Stat. 208, 25 U.S.C. 13, discussed with various appropriation Acts, in *Morton v. Ruiz*, *supra*, slip op. 5-9. Congress also has the power to terminate the government's role as guardian, and the special rights afforded an Indian tribe, but it will not be presumed to have done so in the absence of clear and unequivocal legislation. *Menominee Tribe v. United States*, 391 U.S. 404; *Mattz v. Arnett*, 412 U.S. 481.

The guardianship principle and the unique history of federal relations with the Indian tribes, recognized by the Constitution and continuing to the present day, permits special arrangements that might not be appropriate with respect to other groups. The legislation challenged here, no less than a tax immunity, see *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, or a welfare benefit, *Morton v. Ruiz*, *supra*, or a law governing the devolution of trust property, *Simmons v. Eagle Seelatssee*, 384 U.S. 209, affirming 244 F. Supp. 808 E.D. Wash., is a proper exercise of the guardianship function. The preference for Indians in the Indian service helps fulfill two important governmental objectives in the exercise of this guardianship role: enhancement of Indian control over their own land and affairs, and the provision of employment and training for qualified Indians.

The underlying objectives of Congress, in the exercise of its fiduciary powers, have varied over the years. See, generally, Comment, *The Indian Battle for Self Determination*, 58 Calif. L. Rev. 445 (1970). But a principal goal has been aiding Indian tribes to govern themselves, maintain their culture and, more recently, to achieve control over the governmental programs that affect them. These themes of self-government, which have been upheld and emphasized by this Court over the years,²² were, as we have shown, central in the passage of the Indian pref-

²² See *Cherokee Nation v. Georgia*, 5 Pet. 1, 16; *Williams v. Lee*, 358 U.S. 217, 220; *McClanahan v. Arizona State Tax Commission*, *supra*.

erence provisions of the Indian Reorganization Act. They remain important today. For example, the President's 1970 Message to Congress (6 Weekly Compilation of Presidential Documents, 894, 896 (1970)) stated that the goal of national policy toward Indians must be:

[T]o strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.

This is in accord with the as yet not wholly fulfilled promises of 1934 of government help without government domination. The enactment of statutes directing that tribal Indians be given preference for employment in the Bureau of Indian Affairs, the federal agency which most directly and significantly affects their everyday lives, is an appropriate means chosen by Congress to advance that end.

A second purpose of the preference laws is to combat Indian unemployment and foster Indian educational opportunities. As we have shown (*supra*, pp. 21-22), the 1934 Act reversed the trend of lessened Indian participation in the Indian service, and its policy of fostering tribal Indian employment has been paralleled by the provisions of Section 701(b) and 703(i) of the 1964 Civil Rights Act (*supra*, p. 24) permitting preferences for Indians in employment by tribes and employment by private industry on or near reservations.

There is, in sum, ample constitutional basis for the long-standing federal statutory policy of granting preference to tribal Indians in employment in the Indian Service.

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

CARLTON R. STOIBER,
PHILIP STEPHEN FUOCO,
M. PATRICIA SCHAPPER,
Attorneys.

MARCH 1974.

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-362

ROGERS C. B. MORTON, Secretary of the
Interior, et al., Appellants,

VS.

C. R. MANCARI, et al., Appellees.

No. 73-364

AMERIND, Appellant,

VS.

C. R. MANCARI, et al., Appellees.

On Appeal from the United States District Court
for the District of New Mexico

MOTION OF THE MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF) requested the parties in these cases to consent to filing the attached brief ami-

cus curiae. Only Appellants have granted their consent.¹

MALDEF was established on May 1, 1968, as a non-profit corporation incorporated under the laws of the State of Texas, primarily to provide legal assistance to Mexican Americans (Chicanos).² It is headquartered in San Francisco, with additional offices in San Antonio, Los Angeles, Denver, Albuquerque, and Washington, D.C.

As Courts frequently have recognized, Mexican Americans constitute a separate group which historically has been subject to illegal and pervasive discrimination in our society.³ MALDEF, in its efforts to assist the Mexican American community achieve its rights under law, is actively involved in litigation to challenge the traditional barriers with which Mexican Americans are faced: abridgment of participatory constitutional, civil, and political rights; unequal educational opportunities; unequal distribution of public services; law enforcement misconduct; and discriminatory employment practices.

The questions presented in these instant cases arise out of an action brought in the United States District Court for the District of New Mexico seeking to enjoin implementation and enforcement of 25 U.S.C. §§44, 46, and 472, the Indian Preference Statutes, as

¹The letters of consent have been filed with the Clerk.

²Currently the word Chicano is used interchangeably with the term Mexican American.

³E.g., *Hernandez v. Texas*, 347 U.S. 475 (1954); *White v. Regester*, 93 S.Ct. 2332 (1973); *Keyes v. School District No. 1, Denver, Colorado*, 93 S.Ct. 2686 (1973).

violative of the Fifth Amendment to the Constitution and contrary to Section 717 of the Equal Employment Opportunity Act of 1972, amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16.

In No. 73-362 Appellees Mancari, et al., brought a class action on behalf of themselves and all other employees of the Bureau of Indian Affairs (B.I.A.) who are of less than twenty-five percent Indian blood. In No. 73-364 Appellant Amerind intervened in the above-mentioned class action.

A three-judge district court was convened to hear Appellees' claim which sought to enjoin the Appellants in No. 73-362 from implementing and enforcing, pursuant to the Indian Preference Statutes, a B.I.A. policy which gives preference to persons of one-quarter or more Indian blood in initial hiring, training, promotion, and reinstatement. The three-judge district court entered an order enjoining the enforcement of the Indian Preference Statutes on the grounds that they were overridden by Section 717 of the Equal Employment Opportunity Act of 1972.⁴

MALDEF has litigated numerous suits attacking discriminatory and illegal employment practices affecting the lives and liberties of Mexican Americans and other minorities. The theory of many of these suits is that the Constitution and federal civil rights laws fully protect, and in some circumstances man-

⁴The Opinion of the District Court is not yet reported although it has appeared in 5 FEP Cases 1321. The Opinion is also reproduced in the Jurisdictional Statement in No. 73-362, at p. 13.

date, good faith affirmative action employment programs.

MALDEF agrees entirely with the Appellants in No. 73-364 that the constitutionality of the Indian Preference Statutes is soundly predicated on several unique factors: the historic, legal, social and political status of the Indian Tribes within the United States; Congress' plenary power under the Indian Commerce Clause, U.S. Const. Art. I, §8, cl. 3; and the relationship between the B.I.A. and the Indian Tribes. However, since the decision of the Court in this litigation may affect the scope of 42 U.S.C. §2000e-16 and the Fifth Amendment more generally with respect to affirmative action programs and remedies, MALDEF deems it important to bring to the Court's attention some implications of the issues here presented by respectfully praying leave to file a brief *amicus curiae* in support of Appellants.

In the attached brief, MALDEF presents the argument that the District Court was not justified in holding that the Indian Preference Statutes must give way to the Civil Rights Act. The brief also argues that the Indian Preference Statutes can withstand constitutional challenge.

Respectfully submitted,
VILMA S. MARTINEZ,
SANFORD JAY ROSEN,
RAY VARGAS,

Mexican American Legal Defense and
Educational Fund,

Attorneys for Amicus Curiae.

March, 1974.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1973

No. 73-362

ROGERS C. B. MORTON, Secretary of the
Interior, et al., *Appellants*,

VS.

C. R. MANCARI, et al., *Appellees*.

No. 73-364

AMERIND, *Appellant*,

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C. R. MANCARI, et al., *Appellees*.

BRIEF OF AMICUS CURIAE

ARGUMENT

I

THE INDIAN PREFERENCE STATUTES ARE NOT IN CONFLICT WITH TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972.

- A. The Purposes of Both The Indian Preference Statutes And The Civil Rights Act Of 1964 As Amended By The Equal Employment Opportunity Act of 1972 Are To Secure For Minorities Equality of Employment Opportunity.**

With the passage of the Indian Reorganization Act of 1934, which included 25 U.S.C. §472, Congress in-

tended to reform the Bureau of Indian Affairs (B.I.A.) by integrating the Native Americans into government service which affected the administration of their affairs.⁵

Congress was anxious to promote economic and political self-determination for the Indian. Specific concern was directed to reforming the B.I.A., which exercised vast power over Indian lives but was staffed largely by non-Indians. Through the preference given to Indians by § 472, it was hoped that the B.I.A. would gradually become an Indian service predominantly in the hands of educated and competent Indians.

Mescalero Apache Tribe v. Hickel, 432 F.2d 956, 960 (10th Cir.), cert. denied 401 U.S. 981 (1971).

Although there have been some successful results in the implementation of the statutory preference (see Tr. 85),⁶ to this day relatively few Native Americans occupy policy making positions within the B.I.A. See Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1820 (1968).

The policy of preferring competent and qualified Native Americans in B.I.A. employment is a proper and legitimate response by Congress to practices of the B.I.A. which had failed to secure adequate em-

⁵See generally S. Rep. No. 1080, 73d Cong., 2d Sess. at 1 (1934); Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. at 39 (1934); Hearings on S. 2755 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 9270 (remarks of Senator Wheeler), 11727, 11729, 1131-32 (remarks of Representative Howard) (1934).

⁶"Tr." refers to the transcript of the trial held November 29, 1972, which has been lodged with the Clerk by the Appellants in No. 73-362. See Appellants' Jurisdictional Statement, No. 73-362.

ployment opportunities to Native Americans prior to the passage of the Indian Preference Statutes. *Mescalero Apache Tribe v. Hickel*, *supra*, 432 F.2d at 958. Such preferential hiring or remedial affirmative action efforts have never been held by this Court to be inconsistent with Title VII of the Civil Rights Act of 1964 or the Equal Employment Opportunity Act of 1972. In fact the Court in *Griggs v. Duke Power Co.*, 401 U.S. 429 (1971), did not disapprove of the decision of the Court of Appeals to the extent that it had ordered that qualified minority victims of prior discrimination be preferred over other candidates for employment promotion.⁷ Preferential hiring and promotions which operate to purge minorities of the consequences of discriminatory employment barriers obviously therefore are not the discriminatory preferences which Congress sought to proscribe. The

⁷Although the Duke Power Company employed blacks and whites for its labor department, only whites were allowed to transfer into higher paying departments prior to 1965. When the company imposed a high school diploma and general intelligence tests as requirements for employment or promotion, blacks in the labor department were effectively locked-in that department, even though whites who had less seniority and had not met the new requirements were allowed to retain their prior unconditional promotions to other departments. "The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying department could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them." *Griggs v. Duke Power Co.*, 401 U.S. at 429, n. 4. By forbidding the company to apply these requirements to those blacks who had been on the job when the requirements were imposed, the Court of Appeals, in effect, required the employer to prefer black employees over white employees who might have been equally, if not more, qualified for promotion than the black employees. See also *Developments In The Law: Employment Discrimination And Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1291 (1971).

purpose of Congress in enacting Title VII of the Civil Rights Act of 1964 was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30.

Nothing in Title VII, as amended, or in its legislative history, reveals that it was Congress' purpose in any way to repeal or alter its prior determination that Native Americans should be granted employment preferences within the BIA. In fact, the purposes behind the two statutes are so consistent that the statutes themselves are fully compatible. Both Title VII as amended and the Indian Preference Statutes were intended to protect minorities from employment discrimination, and generally to improve the status of minorities who have been subject to historic and pervasive discrimination and deprivation. Implementation of these policies may frequently require preference of qualified minorities over similarly qualified whites in order to remedy practices which have resulted in discrimination against minorities.

This Court in *dicta* has expressed the view that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" in enacting Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431. By this the Court only meant that Congress has prohibited the establishment of reverse discrimination in order merely to attain racial balance. *United States v. Wood, Wire and Metal Lathers International Union, Local 46*, 471 F.2d 408,

413 (2d Cir. 1973). Notably, on the other hand, in actions under Title VII of the Civil Rights Act of 1964 as amended, "Congress has specifically granted authority to the trial courts to 'order such affirmative action as may be appropriate, which may include . . . hiring of employees' 42 U.S.C. §2000e-5(g)." *Carter v. Gallagher*, 452 F.2d 315, 330 (8th Cir. 1972) (opinion on *en banc* rehearing), *cert. denied*, 406 U.S. 950 (1972). And it is clear that the anti-preferential treatment section of Title VII, 42 U.S.C. §2000e-2(j),^a does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices. *Carter v. Gallagher*, 452 F.2d at 329.

There is no doubt that the fashioning of affirmative action remedies presents practical problems which may differ significantly, depending on the circumstances, from case to case. Nevertheless, Congress has granted the courts broad powers to formulate relief enforcing the legislative mandate of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of

^a"Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

1972.⁹ It does not follow that Congress has determined or the Constitution requires that, for purposes of formulating affirmative action consistent with the Constitution, findings of specific prior discriminatory acts are proper only if made by a judicial body, or that only the courts may fashion specific affirmative remedies. On the contrary, this Court has ruled, for example, that "§ 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). When Congress exercises that power, this Court has instructed that judicial review is severely limited to a determination of whether the legislation is appropriate "... to enforce the Equal Protection Clause, that is, under the *M'Culloch v. Maryland* [17 U.S. (4 Wheat.) 316, 421 (1819)] standard, 'whether ... [the statute] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is plainly adopted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the Constitution.'" 384 U.S. at 651.

Thus, the findings behind the Indian Preference Statutes, and the remedies implemented by these provisions, designed to effectuate the Indian Commerce

⁹In fashioning affirmative remedies, such as preferential hiring, it has been recognized that "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." *Carter v. Gallagher*, 452 F.2d at 330.

Clause as well as the civil rights provisions in the Constitution, are not inconsistent with the findings behind Title VII, as amended, and the remedies effectuated by those provisions, designed to implement the Interstate Commerce Clause and the civil rights provisions in the Constitution. By their terms, and in all other respects, the Indian Preference Statutes are merely more specific than is Title VII, as amended.

B. The District Court Erred by Misapplying The Presumption Against Implied Repeals.

Amicus Curiae fully supports Appellants' position that the applicable rule in this case is that the enactment of a general law, such as Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972, ordinarily does not repeal more specific statutes, such as the Indian Preference Statutes, which limit their scope and application to a particular phase of the subject matter covered by the general law. To accomplish such a repeal the legislative purpose must be unequivocally expressed or the subsequent general statute must present an irreconcilable conflict with the prior special statute. See 1A Sutherland *Statutory Construction* §23.15 (1972).

Even assuming, as the District Court did, that this case does not involve a "simple instance of a relationship of a general statute to a special subject statute" (Appellants' Jurisdictional Statement, No. 73-362, App. A, p. 22), the District Court erred by failing to apply properly the different but also applicable pre-

sumption against repeals by implication. As the Sutherland treatise states:

Interpretation of statutes with regard to the question whether they effect repeal of prior law by implication is conditioned by a judicially formulated and imposed assumption, or *presumption*, against change in the legal order.

The bent of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible, even to the extent of superimposing a construction of consistency upon the apparent legislative intent to repeal, where two acts can, in fact, stand together and both be given consonant operation. Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its *consistent* operation with previous legislation.

The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, . . . The presumption has been said to have special application to important public statutes of long standing.

1A Sutherland *Statutory Construction* §23.10 (1972).¹⁰

¹⁰Furthermore prior laws on the same subject matter as subsequent statutes are to be construed so that effect is given to every provision of each statute and if such statutes are "in apparent conflict, [they] are so far as reasonably possible construed to be in harmony with each other." 2A Sutherland *Statutory Construction* § 51.02 (1972). See also *The Boys Markets v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 719 (10th Cir. 1971).

It appears that the District Court was of the erroneous opinion that the burden of persuasion on this point ought to be on the Appellants. Accordingly the District Court mistakenly held that Appellants had not met their burden because they failed to introduce any evidence to support their position.

There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion. *Griggs v. Duke Power Co.*, 401 U.S. 424. There was no evidence whatsoever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

(Appellants' Jurisdictional Statement, No. 73-362 App. A, p. 22.) But the presumption against implied repeal casts the burden of persuasion on the party arguing for repeal of the prior statute. Yet there is no evidence whatsoever on the face of Title VII, as amended, or in its legislative history, from which it can even be inferred that the Indian Preference statutes have been repealed or pre-empted.

II

**THE INDIAN PREFERENCE STATUTES
ARE NOT UNCONSTITUTIONAL**

The District Court had before it the issue of whether the Indian Preference Laws on their faces or by their application were violative of the Fifth Amendment. Appellees took the position that the preference statutes deprive non-Indian B.I.A. employees of property without due process of law. Although deciding that "the preference statutes must give way to the Civil Rights Act," the District Court nevertheless also took the position that it "could well hold that the statute must fail on constitutional grounds." (Appellants' Jurisdictional Statement, No. 73-362, App. A, p. 23.)

Amicus curiae respectfully disagrees with the District Court's suggestion that there are sufficient grounds to hold the Indian Preference Statutes unconstitutional. Instead amicus curiae submits that Congress has reasonably determined that preferential treatment is necessary and proper not only to promote meaningful integration of Indians into the B.I.A. (*Mescalero Apache Tribe v. Hickel*, 432 F.2d 956 (10th Cir.), cert. denied, 401 U.S. 981 (1971)) but also to increase employment opportunities for qualified Native Americans and to put them in the position to control the administration of programs uniquely designed to govern their lives. These congressional objectives, and the Indian Preference Statutes enacted pursuant thereto, are well within the plenary power which Congress expressly has been delegated under the

Indian Commerce Clause of the Constitution (Article 1, §8, cl. 3). *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972), aff'g 306 F. Supp. 279 (C.D. Cal. 1969).

Further, amicus curiae maintains that the statutes do not violate the Due Process clause of the Fifth Amendment. In evaluating the latter argument, it must be kept in mind that the constitutional issue raised is not whether the Constitution requires the B.I.A. to prefer qualified Native Americans in its employment. Rather the issue is whether the 'Equal Protection Clause,¹¹ designed to protect minorities, permits Congress, through the exercise of its enumerated power under the Indian Commerce Clause, to require limited special treatment for the Native American minority after it has determined that such treatment is necessary to aid the Indian Tribes and to facilitate administration of B.I.A. programs.

The District Court's concern with the special treatment accorded to qualified Native Americans does not warrant the conclusion that such statutes are unconstitutional. The constitutional principle of equality in no way bars the Federal government from preferring qualified Native Americans in employment programs enacted for the purpose of eliminating from our so-

¹¹There is no doubt that this Court has recognized the incorporation of an equal protection guarantee within the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). See *Frontiero v. Richardson*, 36 L.Ed.2d 583 (1973), where eight justices measured the federal statute at issue in that instance against the standards developed from Fourteenth Amendment decisions.

ciety the pervasive and historic deprivations suffered by Native Americans. See, generally, M. Price, *LAW AND THE AMERICAN INDIAN* (1973). Amicus curiae submits that the Equal Protection Clause, incorporated within the Fifth Amendment, does not require that all governmental programs be "color blind" nor does it prohibit consideration of race or ethnic background in attempts by government to correct racial or ethnic inequalities.

The notion that the Constitution is "color blind" was initially put forward by the first Justice Harlan in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), where he declared:

But in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Justice Harlan was protesting, by his dissent, this Court's legitimization of racial segregation through adoption of the "separate but equal" test. Inadvertently, however, he laid the ground work for the arguments of those who oppose remedial or preferential treatment of minority group members even though both the purpose and the effect of this treatment is to bring about both integration and a realistic equal opportunity for members of disadvantaged minority groups.

However, this Court has never declared that all ethnic or racial distinctions and classifications are per se unconstitutional. At most the Court has ruled that

they are "suspect," carry a "very heavy burden of justification," and are subject "to the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). The Court has even studiously declined recent invitations by Justices Douglas and Stewart, concurring in the *Loving*, 388 U.S. at 13, and *McLaughlin*, 379 U.S. at 198, cases, to declare a per se rule of unconstitutionality when criminal sanctions are to be imposed on the basis of "the race of the actor."

Amicus curiae submits that there is a good reason for the Court's apparent reticence. Laws and practices which have the purpose and effect of continuing or increasing the burdens on members of racial and ethnic minority groups, who have been subjected to historic and pervasive discrimination, are unconstitutional. On the other hand, laws and practices which have the purpose and effect of promoting integration and true equality of opportunity for members of such minority groups are constitutional.

In approaching the question of whether a law violates the Equal Protection Clause, this Court has articulated a tripartite analysis:

To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. [Citation omitted.] In considering laws challenged under the Equal Protection Clause, this Court has evolved

more than one test, depending upon the interest affected or the classification involved.

Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (footnote omitted.)¹² Thus, where the basis for a classification is one which has been denominated by the Court to be "inherently suspect" or the individual interest affected is a "fundamental" constitutional right, the Court's standard of review is "exacting" (405 U.S. at 338) and "the Court must determine whether the exclusions are necessary to promote a compelling state interest" (405 U.S. at 437). Where the basis for the classification is not inherently "suspect" and the individual interest affected is not a "fundamental" constitutional right, the Court has held that "... the traditional standard of review ... requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278, 1301 (1973). Cf., *Dunn v. Blumstein*, 405 U.S. 330 (1972).

It is not even arguable that B.I.A. employment is a fundamental constitutional right. Hence the only possible reason for applying the "exacting" test, under the Equal Protection Clause, to the Appellants' actions in the instant cases is the argument that the "basis for the classification" affected by the Indian Preference

¹²By "the character of the classification," the Court means "the basis for the classification," e.g., recent interstate travel, race, national origin, alienage, *see* 405 U.S. at 335.

Statutes may be inherently "suspect." We must, therefore, determine what is meant by an inherently "suspect" classification.

Given the historic purposes of the Equal Protection Clause, the prime example of a "suspect" classification is one based upon race. *E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964). Other notable examples are national origin (*e.g.*, *Oyama v. California*, 332 U.S. 633, 644-46 (1971)), indigency of a criminal defendant (*e.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1950)), and illegitimacy (*e.g.*, *Gomez v. Perez*, 93 S.Ct. 872 (1973)); *Weber v. Aetna Casualty & Surety Co.*, 405 U.S. 164 (1972)).

Although the B.I.A. preference policy, pursuant to the Indian Preference Statutes, creates a classification that is based upon race or national origin, it does not automatically follow that such preferences are subject to the "exacting" test under the Equal Protection Clause. In fact several lines of the decision by this Court make it clear that the "exacting" test is inapplicable to this preference policy.

Amicus curiae knows of no decision in which this Court has applied the "exacting" test where suit was not brought challenging a governmental classification deemed to be disadvantageous to a minority and favorable to a majority. Obviously, the core purpose of the Equal Protection Clause was to effect a radical change in the status of the freedman, i.e., blacks. Extension of this constitutional protection to other minorities which have been subject to historic and

pervasive discrimination and deprivation at the hands of a majority followed as a matter of course.

All persons and groups who have heretofore received the protection of the strict scrutiny standard have been members of such identifiable classes for purposes of the Fourteenth Amendment. See, e.g., *Keyes v. School Dist. No. 1, Denver*, 93 S.Ct. 2686, 2691 (1973); *White v. Regester*, 93 S.Ct. 2332, 2340-41 (1973); *Hernandez v. Texas*, 347 U.S. 475 (1954). The members of each such class—whether it be defined by race, national origin, alienage, illegitimacy or indigency—share three notable characteristics. First, its members have been subjected to historic and pervasive discrimination and deprivations. Second, especially when the classification is based upon race or lineage, members of a suspect class share immutable characteristics that stigmatize them and set them apart from members of the majority group. See, e.g., Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969). Finally, within society in general, but especially in the political arena, they are relatively powerless. As Professor Wechsler has observed of the *Brown* decision: “. . . it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved.” H. Wechsler, *Toward Neutral Principles of Constitutional Law* in H. Wechsler, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 3, 45 (1961). Thus, each of these classes is “. . . a prime example of a ‘discrete and insular’ minority (see *United States v.*

Carolene Products Co., 304 U.S. 144, 152-53, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 304 U.S. 365, 372 (1971).

Nothing in any decision of this Court suggests that a racial or national origin classification is subject to the "rigid scrutiny" standard when its benefits are bestowed upon the members of an identifiable class for purposes of the Equal Protection Clause, or its deleterious effects are neither intended to nor in fact fall upon the members of such a "discrete and insular" minority. *Cf., e.g., McDaniel v. Barresi*, 402 U.S. 39 (1971). Judicial precedent and common sense indicate to the contrary.¹³

This Court has itself specifically fashioned and legitimated race conscious remedies designed to eliminate or ameliorate the historic and pervasive effects of racial discrimination. See, *e.g., Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971). In enforcing federal laws against racial and national or-

¹³That non-Indian minorities are excluded from the benefits of the Indian Preference Statutes is irrelevant to the question of applicability of the "exacting" standard of review. First, Native Americans enjoy a special status under the Constitution, and the B.I.A. has a unique relationship to them and to their status. See generally Brief of Appellants in No. 73-364. Second, it is by no means clear that the "exacting" standard should apply to the determination of whether an affirmative action program is "under-inclusive". If it does so apply, the invitation for argument by "parade of horrors" clearly is irresistible. Thus once the purpose and effect of a special program is deemed to be beneficial to a minority the question of "under-inclusiveness" responds better to analysis according to the traditional rather than the "exacting" standard of review.

igin discrimination in employment, half of the United States Courts of Appeals have validated or directed preferential hiring and promotion remedies. At least two Courts of Appeals have specifically validated affirmative action preferential hiring programs imposed by non-judicial bodies. *Associated General Contractors v. Altshuler*, ____ F.2d ____, 6 FEP Cases 1031 (1st Cir. Nov. 30, 1973); *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971).

Amicus curiae submits that in passing upon the validity of governmental programs that have both the purpose and the effect of providing an advantage to members of identifiable classes for purposes of the Equal Protection Clause, the courts are obligated to apply only the traditional test. They must determine only whether the preferences or "the benign classifications described are at least rationally related to achieving that purpose." Comment, *Developments in the Law—Equal Protection*, 82 HARV L. REV. 1065, 1107 (1969). For this Court's latest application of the traditional standard, see, *Marshall v. United States*, 42 U.S.L.W. 4121 (U.S. No. 72-5881, Jan. 9, 1974).

If the test to be applied is the traditional equal protection test of demonstrating that a preference bears a reasonable relationship to a legitimate governmental interest, then the B.I.A. preference policy, pursuant to the Indian Preference Statutes, is clearly constitutional. Both the purpose and the effect of the preference policy are to benefit members of a minority

group which has been subject to historic and pervasive discrimination and deprivations. The sordid history of oppression and its continuing effects upon the Native American minority in matters relating to health, education, welfare and employment need not be detailed here. It can hardly be argued that it is unreasonable and irrational for Congress, through enactment of the Indian Preference Statutes, to respond to the critical needs of Native Americans by increasing employment opportunity for them within the B.I.A. After serious consideration and based upon its experience in dealing with Indian matters, Congress concluded that an effective method to secure a substantial increase in Native American employees within the B.I.A. was to adopt the Indian Preference Statutes here at issue. Such statutes are constitutional because they are eminently reasonable, if not necessary, in promoting integration of Indians into the B.I.A. and in securing the rights of Native Americans who historically have been subject to gross and invidious discrimination. The preference policy follows a reasonable design and its operation is related to fulfillment of legitimate governmental purposes. Hence the preference policy is constitutional even though its limited operation may exclude non-Native Americans from a government benefit apparently on the ground of race or national origin.

Even if the more "exacting" test of equal protection is applied, the purpose, design and effect of preference policy overcomes "the inherently suspect" quality of the racial classification. In this respect the

suggestion of the court below would clearly be incorrect. It is too late in the day to suggest otherwise. See, e.g., Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV., *supra*, at 1087-91.

The United States Court of Appeals for the Second Circuit has articulated the proper interpretation of Justice Harlan's "color blind" *dictum*. In an opinion by Judge Smith, that Court declared that government urban renewal agencies are under a special obligation to provide adequate replacement housing for minority group members displaced by renewal projects. Judge Smith specifically observed:

What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968).

CONCLUSION

For the reasons stated in this brief, as well as reasons stated in other briefs in support of Appellants, amicus curiae submits that the decision of the court below should be reversed.

Dated, March, 1974.

Respectfully submitted,

VILMA S. MARTINEZ,
SANFORD JAY ROSEN,
RAY VARGAS,

Mexican American Legal Defense and
Educational Fund,

Attorneys for Amicus Curiae.

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

Nos. 73-362 and 73-364

ROGERS C. B. MORTON, Secretary of the
Interior, *et al.*,

Appellants,

and

AMERIND,

Intervenor-Appellant,

v.

C.R. MANCARI, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR THE APPELLEES

GENE E. FRANCHINI

Matteucci, Franchini,

Calkins & Michael

407 Seventh Street, N.W.

Albuquerque, New Mexico 87101

Attorneys for Appellees

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STATEMENT OF THE CASE

Appellees take exception to the Statement of the Case
by Intervenor Appellant AMERIND in the following
respects:

First, the Bureau of Indian Affairs does not govern the lives of one class of peoples, namely, the Indian American.¹ The Bureau of Indian Affairs is one of many federal agencies rendering services to Indians.²

Second, the Bureau of Indian Affairs performs the dual role of trustee for Indian property, and serves as one of many channels through which services from both federal and state governments are rendered to Indian people. The Indian tribes, under the Indian Reorganization Act of 1934, are local self-governing entities. The thrust of the federal program in recent years has been to encourage greater Indian self determination through grants and contracts through which the Indian tribes render services formerly rendered by the Bureau of Indian Affairs, or other government agencies.³

¹ Intervenor Appellant's Brief, p.4.

² In 1974 the President of the United States requested 1.45 billion dollars to support economic and sound development of American Indians on reservations and Alaska natives, of which \$544,249,000.00 was requested for the Bureau of Indian Affairs. Budget of the U.S., Jan 29, 1973.

³ Highlights of the Department of the Interior Bureau of Indian Affairs Budget, February 1974.

The Bureau's budget request for fiscal year 1975 is presented in a new appropriation structure which more clearly and adequately describes the activities and functions of the Bureau and its organizational structure. In keeping with this Administration's key policy which allows concerned Indians to assume the control and operation of Federally funded and administered programs, the new proposed structure includes a line item as a subactivity in the operation of the Indian Program appropriation entitled "Direct Indian Operations" for all programs with the exception of Trust Responsibilities and Services—Indian Natural Resource Rights Protection and Real Estate and Financial Trust Services. There will remain implicit in this assumption of operations policy the fact that the Indian tribes, organizations, or individuals will make the

Third, AMERIND'S Statement of the Case ignores the thrust of the Indian Reorganization Act to strengthen Indian self government and to shift control of Indian affairs from the federal bureaucracy to the self governing tribes.⁴

ARGUMENT

I.

THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 REPEALED, BY IMPLICATION, THE ACTS OF CONGRESS GIVING INDIANS PREFERENCE IN EMPLOYMENT IN THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF THE INTERIOR.

Appellees Mancari, *et al*, realize that Indians are unique persons with a different history. Appellees do not question the right of Congress to deal with Indians in an extraordinary manner. Congressional power in this area is plenary.

However, none of the appellants in this matter deny that Indian employees in the Bureau of Indian Affairs are federal employees nor do they deny that the Equal

determination of *what* they wish to assume and *when* they will do so. Also, as in the past, the right to return control and operation of programs to the Bureau is available at all times and in all instances. Bureau officials will act as brokers and never as salesmen. (Emphasis is ours).

⁴Indian Reorganization Act of 1934, 25 USCA 12, Sec. 461, through 479.

Employment Opportunity Act of 1972 applied to all non exempted federal employers and their employees.⁵

In the Civil Rights Act of 1964, an exemption was made for Indians living *on or near a reservation*. Section 703 (i), 42 USC § 2000e-2(i) (Emphasis ours). In fact, the exemption is granted only to any business or enterprise operating on or near a reservation with a publicly announced employment practice of assisting Indians. Congress could grant such an exception here because these businesses are not under Fifth Amendment Restrictions.

Such an exemption or restriction is conspicuously absent from the 1972 Equal Employment Opportunity Act and for good reason.

First, as a matter of congressional record, Senator Byrd of West Virginia and Senator Humphrey of Minnesota speaking for the 1972 Act made the following remarks:

⁵ Section 717 provides in part as follows:

"Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in Section 102 of Title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in Section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from non-appropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex or national origin."

Senator Byrd:

"I do not favor special treatment or special consideration or favored employment of any individual on the basis of that person's being Black or White, male or female . . . Notwithstanding what I have just said, the fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States . . .

"In other words, he should rise or fall on the basis of merit, not on the basis of race or religion or sex. Every qualified individual . . . Black, White or else—should be given an equal chance—not preferential treatment—at employment."

(Congressional Record, January 26, 1972 at §590).

Senator Humphrey:

"We must make absolutely clear the obligation of the Federal Government to make all personnel actions free from discrimination based on race, color, sex, religion or national origin."

(Congressional Record, January 20, 1972, at §172-173).

Second: The fact that Section 105 of Title 5 of the United States Code specifically lists Executive department, which includes the Department of the Interior and is referred to and included in Section 717 of the 1972 Act strongly indicates that Congress did not intend to exclude that which they specifically included by reference.⁶

⁶Title 5 §105 *Executive Agency*

For the purpose of this title, "Executive Agency" means an Executive department, a Government corporation, and an independent establishment. Pub.L. 89-554, Sept. 6, 1966, 80 Stat.379.

The major portion of Appellant Morton's argument on this First Point is an argument that the Congress should not have repealed the Indian Preference Act of 1934. The issue here is whether or not Congress did, in fact, repeal the Preference Acts by passage of the 1972 Equal Employment Opportunity Act.

The additional argument on this point made by all Appellants is the argument that in the absence of contrary legislative intent, general legislation does not repeal earlier special legislation.

In answer to this contention, Appellees point out above that the intent of Congress in this case seems clearly to be to repeal the Preference Acts. Furthermore, as pointed out by the Court below, (Appellants Jurisdictional Statement, Appendix A, P.22)

This is not a simple instance of a relationship of a general statute to a special subject which often occurs. Each statute purports to cover the same particular subject of personnel actions relating to, as Section 717 described them, "... discrimination based on race, color, religion, sex or national origin." One Act applies to all but some excepted bureaus or agencies and the other to the "Indian Office". This is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes. Further by the nature of the subject matter and scope, the two cannot exist side by side. See *Posadas v. National City Bank*, 296 U.S. 497.

When Appellants argue that the 1972 Equal Employment Opportunity Act is a general statute and the Indian Preference Statutes are specific legislation and that therefore the latter should be upheld in resolving conflicts, they are merely characterizing these pieces of legislation and such characterizations are self serving and simply state conclusions. It is far more realistic to view the 1972

Act and Indian Preference and Congressional actions of equal import. In resolving the obvious conflict between the two, this Court should favor the interpretation which would be most in line with this Nation's recent wealth of Civil Rights Legislation. An interpretation that the Civil Rights Act of 1972 is the law of the land and impliedly repealed the Indian Preference Statutes is much more consistent with the trend of Civil Rights and Equal Employment Opportunity cases decided by our Federal Courts in the preceeding twenty (20) years.

Section 717 of the 1972 Act, Public Law 92-261, 86 Stat. 103 (March 24, 1972) which brings Federal Employees under the Act, should also be read in *pari materia* with the other sections of the 1972 Act and with the complete Act of 1964. Statutes in *pari materia* are to be construed together and not in conflict with each other.

When a conflict such as in this case, is present, the most recent law or Act should apply and the conflicting Preferences passed some 39 years earlier should be impliedly repealed.

The Court should note that certain exceptions are contained in the Act but none of these exceptions apply to the Indians or the Bureau of Indian Affairs. (See 1972 U.S. Code Cong. and Ad News pp. 2137 and 2157).

It was noted by the Lower Court that nothing was present in the Committees Report or in House Report No. 92-238 accompanying H.R. 1746 enacted into law as Public Law 92-261 which indicated that the Bureau of Indian Affairs be exempted or excepted from its provisions. Had Congress intended to make an exception for Indian Preference, all that had to be done by it is to place such exception in the Act. Such exception is conspicuously absent.

Finally, to hold that the 1934 Preference Statute for Indians can stand in the face of the 1972 Equal

Employment Opportunity Act would create, in Appellees view, the most flagrant case of discrimination that has ever existed or will ever exist in this Country. The Equal Employment Opportunity Act of 1972 should be held to have repealed, by implication, the Indian Preference Statute.

II.

THE "INDIAN PREFERENCE STATUTES", BEING TITLE 25 USC SEC. 44, 46 and 472, ARE UNCONSTITUTIONAL AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Appellees herein, a woman, a Jewish man, a Mexican American, and a Black American, are all non-Indian employees of the Bureau of Indian Affairs, (R.22, 23 142). None of them are employed on or near an Indian Reservation. They perform technical and ministerial tasks and no claim has ever been made that they make decisions for Indians involving Indian matters or participate in any manner in the government of Indian tribes.

Appellees contend that the Indian Preference Acts discriminate against them on a racial basis in promotion to positions likewise not located on or near an Indian Reservation. They have been and are denied jobs and promotions in the same categories and involving similar tasks that they are qualified to perform.

Appellees contend that the Indian Preference Acts are unconstitutional for the following reasons:

First: As to them, the Bureau of Indian Affairs has not constitutionally applied the Indian Preference Acts as written.

The term "Indian" as used in 25 U.S.C., Section 472, is defined in 25 U.S.C. Sec. 479. It defines "Indian" as follows:

The term "Indian" as used in Sections 471-473, 474, 475, 476-478 and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian Tribe now under Federal jurisdiction, and all persons who are descendants of such members, who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include *all other persons of one-half or more Indian Blood*. (Emphasis ours.)

The Bureau of Indian Affairs has admittedly applied a one-quarter Indian blood criterion in applying these Preference Acts.⁷ This is in obvious contradiction to the Act itself.

Section 479 clearly indicates that the definition of the term "Indian" intended by Congress in passing Chapter 576 is inconsistent with the new Indian Preference Policy. The Appellants are clearly exceeding the authority granted by Congress in enforcing a preference to those with one-quarter or more of Indian Blood. Appellees also urge that the case of *Simmons v. Eagle Selatsee*, 244 F.Supp. 808 (E.D. Wash. 1965) does not save Appellants' use of the one-quarter or more Indian blood test. The Simmons case was very clear in interpreting the Congressional Act of August 9 1946, 60 Stat. 968 (25 U.S.C. Section 607) Section 7. The Simmons case in no way referred to Section 479 which contains the controlling definition of the term "Indian" for purposes of the new Indian Preference Policy.

In attempting to find authority for their new Indian Preference Policy the Appellants are therefore quite clearly taking one section of *Chapter 576, Public Law*

⁷44 Indian Affairs Manual, 302.1

383 out of context and at the same time ignoring other sections which specifically contradict other elements of that policy.

Another section relied on by the Appellants for Indian Preference is *Section 44, Title 25 U.S.C.* To place this particular section in its proper perspective, plaintiffs urge the Court to view this provision in its original context. The provision appears at *28 Stat. 313* and is merely one section of Chapter 290 which was approved by Congress on August 15, 1894. Chapter 290, in total, is found in *28 Stat. 286 to 338*. This provision which merely states that Indians shall be employed in the Indian Service is hardly authority for the effort now being taken by the Appellants.

Specifically, the Appellees draw the Court's attention to *Section 478 of Title 25 U.S.C.*, which provides:

Sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478 and 479 of this title shall not apply to any reservations wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice. June 18, 1934, c.576, Section 18, 48 Stat. 988.

It was clearly Congress' intent that Section 472 should not apply to any reservation which voted against its application. After the passage of Chapter 576, Public Law 383, such elections were held on numerous reservations with the result that the entire Chapter would not be applied to those reservations. One of these reservations rejecting Chapter 576 was the Navajo Reservation, the largest in the United States. Tribal operations records within the Bureau of Indian Affairs will show that many

other reservations also rejected Chapter 576 in total. In view of these individual rejections by reservations it is most difficult to see how the Bureau of Indian Affairs, as a matter of policy, can enforce its present Indian Preference Policy on a Bureau-wide scale. It would have been inconsistent for Congress to include the provisions of Section 478 and yet have intended the interpretation of Section 472 that the Appellant MORTON has put into effect.

Secondly, Appellees contend that the Indian Preference Act is unconstitutional for the following reasons:

The Fifth Amendment of the United States Constitution provides in part that citizens of the United States shall not "be deprived of life, liberty or property, without due process of law;" The Fifth Amendment does not contain an "equal protection clause" as does the Fourteenth Amendment; however, the Supreme Court has held that discrimination, when brought about by Federal action, may be so unjustifiable as to be violative of due process. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Also see the cases of: *Detroit Bank v. United States*, 317 U.S. 329, *Curry v. Wallace*, 306 U.S. 1, and *Stewart Machine Company v. Davis*, 301 U.S. 548. These latter cases recognized that gross discrimination by the Federal Government can be violative of the due process clause of the Fifth Amendment although, their specific fact situations did not justify such a holding.

The Supreme Court has also held that any classifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and constitutionally suspect. *Korematsu v. United States*, 323 U.S. 214 and *Hirabayashi v. United States*, 320 U.S. 81. These two cases allowed a federally imposed classification based on race, but the Courts made it clear that such classifications were justified only in view of the

imminent dangers of attack imposed on the United States mainland during World War II.

Another case holding that classifications drawn along racial lines are particularly constitutionally suspect is *United States v. Thoresen*, 428 F.2d 654 (C.A. Cal. 1970). The classification in this case was not along racial lines and the Court found that there was an overriding statutory purpose for the classification.

There should be little doubt that the rights of Appellees in this case to seek promotions on non-discriminatory grounds is a property right, but that their liberties, guaranteed by the Fifth Amendment, are also being impaired by the Appellants actions. See *Bolling v. Sharpe*, *Supra* at 499 and 500.

The Appellees further urge to the Court that the authorities raised and relied on by the Appellants in their Briefs miss the mark of deciding the issue of the constitutionality of the "Indian Preference Statutes".

In arguing for the constitutionality of the "Indian Preference Statutes" the Appellants rely upon *Board of County Commissioner v. Seber*, 318 U.S. 705 (1943). The *Seber* case is not on point with the Constitutional issues raised in this cause for the *Seber* case did not decide the issue of whether the tax exemption statutes were violative of the "due process clause" of the Fifth Amendment. The *Seber* case, contrary to the instant case dealt with the tax exempt status of certain lands which in essence were in a trust status with the United States being the trustee. In the instant case there is involved a clear dispute between the rights of Indians as individuals and non-Indians as individuals. In contrast, the *Seber* case involved a dispute between the property rights of Indians and the sovereign powers of a State to tax lands within the State.

The second case relied on by Appellants is *Simmons v. Eagle Selatsee*, 244 F.Supp. 808 (E.D. Wash. 1965); the

Simmons case likewise misses the mark of being persuasive in the instant case because *Simmons* merely decided what percentage of Indian blood was proper to determine whether an individual part Indian, could take by inheritance or by will an interest in the restricted trust estate of a Tribe. The *Simmons* case did not give Indians any kind of preferential treatment vis-avis non-Indians. The *Simmons* case would be instructive on the issues in this cause if the class of plaintiffs were a group of Indians of one-eighth Indian blood.

The remaining cases cited by Appellants in support of their positions on the issue constitutionality, *The Cherokee Nation v. Georgia*, 5 Pet. 1, 16 and *United States v. Kagama*, 118 U.S. 375 are cases decided in 1856 and 1886 and stand only for the proposition that Indians have had a different and perhaps unique status and relation to the United States. None of these cases go directly to the point at issue here.

Thirdly, Appellees contend that the Indian Preference Act is unconstitutional in that it applies a criterion for hiring and promotions in a Federal Bureau based upon race. It creates, out of the Federal non-Indian employee in the Bureau of Indian Affairs, a second class citizen.⁸ This is true in addition to the fact that non-Indian employees are minority employees in the Bureau of Indian Affairs.⁹

Appellees support efforts to meet the special distinct needs of Indian citizens. However, the objectionable and unconstitutional aspect of Appellants position is that the

⁸Secretary of the Interior, Rogers C. B. Morton Press Conference at Olympia, Washington, December 2, 1971, where he stated: "And the other thing is that when you have Indian preference—and you do have Indian preference for promotion and employment—the non-Indian in the Bureau becomes a second-class citizen".

⁹R.41

special protections being given to Indians in this case directly involve the deprivation of rights of non-Indian citizens.

The Appellants, here, have not shown in their Briefs or by any evidence during the trial of this cause that having any percentage of Indian blood was in any way related to the various jobs to be done. The Court below pointed this out clearly.¹⁰ In addition it has never been shown that having one-quarter blood of one Indian Tribe was of any assistance in working with members of another Indian Tribe.¹¹

Finally, the case of *Griggs v. Duke Power Company*, 401 US 424 (1971) indicates strongly that preferences such as we have here must fall where there is no showing that the racial background of the applicant is not reasonably related to job performance. Chief Justice Burger summarized the correct and proper view of preferences under the Civil Rights Act at page 400 of the Opinion.

"Congress did not intend by Title VII, however, to guarantee a job to every person regardless of

¹⁰There was no evidence introduced to show in any way that having seventy-five percent non-Indian blood and twenty-five percent Indian blood was in any way a job-related criterion. *Griggs v. Duke Power Co.*, 401 U.S. 424. There was no evidence whatever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

¹¹Secretary Morton Reports on Indian Matters, Menlo Park, California, March 1973, where stated "It is difficult to generalize when describing the characteristics of the Indian Community. There is great variance in point of view and attitude among individuals and wide differences in the styles and approach to life from tribe to tribe".

qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification".

The Indian Preference Statutes are unconstitutional as violative of the Fifth Amendment of the Constitution of the United States.

CONCLUSION

For all of the above reasons the Judgment of the Three Judge Panel in the United States District Court for the District of New Mexico should be affirmed.

Respectfully submitted,

/s/Gene E. Franchini
Matteucci, Franchini, Calkins & Michael
407 Seventh Street Northwest
Albuquerque, New Mexico 87101
Attorneys For Appellees

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-362 and 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*, *Appellants,*

—and—

AMERIND,
Intervenor-Appellant,

—v.—

C. R. MANCARI, *et al.*, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

**REPLY BRIEF FOR
INTERVENOR-APPELLANT AMERIND**

Amerind will not reiterate its arguments on the major issues in this case, since we believe that these are adequately dealt with in our main brief. However, Appellees have raised two new issues. First, they argue that the application of the Indian Preference Statutes to all persons of one quarter or more Indian blood, instead of to those of one half or more Indian blood, is unconstitutional. Second, they assert that the extension of Indian Preference to tribes which voted against certain provisions of the 1934 Wheeler-Howard Act is unconstitutional. We will address these two issues in this brief.

I. THE ELIGIBILITY CRITERION FOR INDIAN PREFERENCE USED BY THE BUREAU OF INDIAN AFFAIRS DOES NOT INFRINGE ANY CONSTITUTIONAL RIGHT OF APPELLEES

Appellees assert that the Indian Preference Statutes are being unconstitutionally applied to them because a preference is granted to persons of one quarter Indian blood rather than just to persons of one half or more Indian blood.¹ Appellees cannot raise this argument now, since they have failed to show, either as individuals or as class representatives, any injury, benefit, or interest in the application of a one quarter Indian blood standard rather than a one half Indian blood standard. Besides, Appellees' argument is not addressed to the constitutionality of the statute, but instead to its construction, and is therefore not an issue before the Court.²

In any event, even if the issue were properly before the Court, Appellees' contention is completely devoid of merit. Section 19 of the Wheeler-Howard Act, 25 U.S.C. § 479 establishes three categories of persons who shall be included as Indians for, *inter alia*, the purposes of the Indian Preference Statute of 1934, 25 U.S.C. § 472:

"The term 'Indian' as used in sections . . . 471-473 . . . of this title *shall include all persons of Indian descent*

¹ See Brief for Appellees at 8, 9.

² Moreover, it has long been held that, "Congress, or its delegated agents, [have] full power to define and describe those persons who should be treated and regarded as members of an Indian tribe. . . ." *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 813 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966). This Court has traditionally declined to review Congressional or administrative action regarding Indian membership. See *Baker v. Carr*, 369 U.S. 186, 215 (1962).

who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members, who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." (emphasis supplied).

The first category, unlike the third, does not specify a blood standard. It refers only to tribal membership. Only members of Federally-recognized tribes are eligible for Indian Preference (App. 200). Thus the Bureau's interpretation of the term "Indian" in the application of Indian Preference is fully in accord with Section 479, and, indeed, is narrower than the statute would allow.*

II. THE INDIAN PREFERENCE STATUTES APPLY TO ALL FEDERALLY-RECOGNIZED TRIBES, AND THIS APPLICATION OF THE STATUTES BY THE BUREAU OF INDIAN AFFAIRS DOES NOT INFRINGE ANY CONSTITUTIONAL RIGHTS OF APPELLEES

Appellees contend that it is unconstitutional for the Bureau of Indian Affairs to grant preference to Indians whose tribes voted against certain provisions of the Wheeler-Howard Act in elections called during 1934 and 1935 pursuant to 25 U.S.C. § 478.⁴ Even if this contention were correct, it would not undercut the application of Indian Preference to members of tribes who did not so vote. The argument

* One reason for selecting the quarter-blood test is that many tribes require one quarter Indian blood for tribal membership.

⁴ Brief for Appellees at 10-11.

therefore goes not to the constitutionality of Indian Preference, but rather to the scope of its application. In any event, as the court below concluded, Appellees' argument is incorrect.

The Wheeler-Howard Act inaugurated an extensive reorganization of reservations, tribal governments, and Indian affairs generally. The Act was designed, in the words of its title,

"To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." 48 Stat. 984 (1934).

Because certain provisions of the Act allowed the tribes to adopt constitutions or corporate charters, the Indians were authorized to vote on these measures, reservation by reservation. See 25 U.S.C. §§ 476-478.

However Section 12 of the Act, 25 U.S.C. § 472, only broadened and confirmed the benefits of previous Indian Preference Statutes such as 25 U.S.C. §§ 44-47 and 274. Section 472 applies to all qualified members of Federally recognized tribes; and is not restricted to any particular reservations. No Indian tribe or reservation has ever rejected the benefits of the Indian Preference Statutes.*

Appellees disregard these considerations, and assert that members of those tribes which rejected portions of the Wheeler-Howard Act more than forty years ago cannot be eligible for Indian Preference. The Court below weighed the arguments and held:

* Testimony of Raymond Gunter, App. 200-201.

"In one of the sections, now 25 U.S.C. § 478, provision is made for submission of 'the Act' for acceptance or rejection by the various Indian tribes. This voting section (478) on its face would appear to make the application of section 472, with which we are here concerned, optional with individual tribes by requiring a special election of the adult members of the tribe to vote on the application of the entire Act.

"The Reorganization Act was submitted and voted on and was rejected by a considerable number of tribes. . . . [T]he other sections, as well as a review of the Congressional history of the Act, convinces us that the elections were to be only for the purpose of accepting or rejecting sections 476 and 477 of Title 25, 48 Stat. 987-88. For example, we cannot believe that Congress intended all the Indian tribes to vote on the extension of boundaries of the Papago Reservation (section 463a, 50 Stat. 536), on the Secretary making rules and regulations for the operation and management of Indian forestry units (section 466, 48 Stat. 986), or on appropriations for vocational and trade schools (section 471, 48 Stat. 985), or on other provisions found in the Indian Reorganization Act. It is difficult to see how under any other construction the Act would be valid.

. . .

"Nothing which followed in the debate or in the way of amendments suggests to us that the option of acceptance was extended to any other portion of the Act, and therefore the preference section here concerned must be held to extend to all Indians as individuals." *Mancari v. Morton*, 359 F.Supp. 585, 588 (D. N.M. 1973), JSA, App. B at 28-29.

. . .

One other matter raised by Appellants requires brief mention. Appellant argues that there has been no showing that having Indian blood in any way relates to the various jobs to be done in the Bureau (Brief for Appellees, at 14). Amerind has not contended that Indian Preference is primarily a matter of job efficiency, but rather that Congress intended it as a means by which Indians—who occupy a unique constitutional position—could move towards the goal of self-determination. *See* Brief for Intervenor-Appellant Amerind, at 29-32, 34-37. Some statistics recently developed by the U. S. Civil Service Commission, attached as Appendix A, demonstrate the compelling need for Indian Preference as a means of achieving this end. They show that in the States of Arizona and New Mexico, Indian employment in the Federal agencies which do not apply Indian Preference—i.e., all but the Indian Health Service within the Department of Health, Education and Welfare, and the Bureau of Indian Affairs within the Department of the Interior—is minuscule and far below the proportion of Indian residents of these states. Plainly, the competitive service requirements act as a barrier to Indian entry into these agencies, and it is only by means of the Excepted Service provisions of Section 472 that Indians can enter the service of their own people. It is difficult to imagine a clearer demonstration of the need for Indian Preference and the related Excepted Service provisions of Section 472 as a tool towards the Congressional purpose of creating “an Indian Service predominantly in the hands of educated and competent Indians.” (*See* Brief for Intervenor-Appellant Amerind at 29.)

CONCLUSION

For the reasons set forth in the Briefs for the Appellants and in this Reply Brief, the decision of the District Court should be reversed.

Respectfully submitted,

STUART J. LAND

1229—19th Street, N.W.
Washington, D. C. 20036

HARRIS D. SHERMAN

1130 Capitol Life Center
Denver, Colorado 00203

*Attorneys for Intervenor-
Appellant Amerind*

Of Counsel:

ARNOLD & PORTER

PATRICK F. J. MACBORY

ROBERT HENRY WOOD

1229—19th Street, N.W.

Washington, D. C. 20036

April 1974.

APPENDIX A

Indian Employment Figures in
Federal Government Agencies

	<u>Total Emp.</u>	<u>Ind. Emp.</u>	<u>%</u>
<i>Arizona</i>			
Dept. of Interior	5,018	2,378	47.2
HEW	1,457	768	52.7
Agriculture	1,317	26	2.0
Air Force (civilian)	3,827	15	.4
Army (civilian)	4,954	27	.5
Atomic Energy Commission	913	13	1.4
Defense Supply	314	5	1.6
HUD	77	4	5.2
Dept. of Justice	174	0	0.0
Navy (civilian)	122	1	.8
Post Office	2,578	34	1.3
Transportation	969	7	.7
Treasury	208	2	1.0
Veterans Administration	811	21	2.6
 Total (exc. Interior & HEW)	 16,254	 155	 0.9

Arizona State Population
 1,016,000
 State Indian Population
 72,788
 Percentage of Population
 7.2

	<u>Total Emp.</u>	<u>Ind. Emp.</u>	<u>%</u>
<i>New Mexico</i>			
Dept. of Interior	5,692	2,882	51.6
HEW	2,284	995	43.5
Agriculture	1,439	68	4.8
Air Force (civilian)	4,410	21	.5
Army (civilian)	4,498	24	.5
HUD	137	1	.7
Transportation	366	1	.3
	<hr/>	<hr/>	<hr/>
Total (exc. Interior & HEW)	10,850	115	1.05
New Mexico State Population 1,779,900			
State Indian Population 95,812			
Percentage of Population 5.4			

Source: "The Southwest Indian Report," a Report of the
U. S. Civil Rights Commission, May 1973, at 12.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1973

No. 73-362

ROGERS C. B. MORTON, *et al.*,

Petitioner,

v.

C. R. MANCARI, *et al.*,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Federation of Federal Employees is an independent labor organization representing exclusively employees of the Federal Government. The Federation currently represents approximately 120,000 Federal employees. Included in that number are approximately 5,000 Indian and non-Indian employees of the Bureau of Indian Affairs. The Federation seeks to represent before the Court the interest of those Federal employees employed by the Bureau of Indian Affairs as well as the interest of all Federal employees who will necessarily be affected by the outcome of this case.

The oversimplified issue of Indian Preference laws versus the Equal Employment Opportunity Law of

(iv)

1972 skirts the true significance of the pending case, which touches upon the public interest in an effective civil service. The primary concern is the public interest; the interest of every Federal employee and indeed the interest every citizen has in maintaining an effective civil service system based squarely on the merit principle. The integrity of the civil service system is an important consideration over and above the limited interests of the parties.

The interrelationship between the civil service laws and the issues now pending, and the chain reaction effect any decision will have on merit system are matters that should be presented to the Court. Our interest therefore, is the broader public interest of an effective civil service and the preservation of the merit system. Our concern is to protect the interest of all Federal employees, both Indian and non-Indian in the Federal Civil Service system, and in particular to serve those employees who are members of the Federation.

We believe that the interests of the parties and the public interest in an effective civil service as well as the public interest in Indian self-determination and equal opportunity regardless of race are not necessarily irreconcilable. There is a middle ground; a way that will respond appropriately to seemingly contradictory public interests without doing grave violence to any particular national policy.

These competing interests, particularly the public interest and the interest of all Federal employees in a merit-based civil service free from racism or other taints are not adequately represented before the Court.

The National Federation of Federal Employees has represented the interests of Federal employees since 1917. As a major representative of Federal employees familiar with the civil service laws, we are uniquely

(v)

qualified to present to the Court those considerations of national interest which are not fully treated by the parties. We consider this case to be of paramount importance to all Federal employees and believe that it will have implications reaching far beyond the limited self-interest of the parties. Accordingly, the National Federation of Federal Employees prays the Court grant us leave to file the appended brief amicus curiae. Mancari has refused to consent to the Federation's filing of a brief amicus curiae.

Respectfully submitted,

IRVING L. GELLER

1737 H Street, N.W.

Washington, D.C. 20006

Attorney for Amicus Curiae

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-362

ROGERS C. B. MORTON, *et al.*,

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C. R. MANCARI, *et al.*,

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BRIEF AMICUS CURIAE

QUESTION PRESENTED

The pending case touches upon the public interest in a very real way. The National interest, and indeed the interest of every citizen, regardless of race, demands an effective civil service system based on the merit principle. Whether this overriding interest can or should yield to other important interests and national policies is the critical issue before the Court. The real issue facing the Court, therefore, may be phrased as follows:

May the Indian Preference Laws, the Civil Service laws and the Equal Opportunity laws of

the United States be reconciled in such a fashion as to preserve our seemingly conflicting national policies of Indian self-determination of a civil service based on the merit system and of equal opportunity regardless of race.

INTRODUCTION

The American Indian has always enjoyed, and rightly so, a special legal status. This favored legal position was expressed, among other ways, in the so called "Indian Preference" laws. Of primary importance are Sections 45 and 472 of Title 25 of the United States Code. Section 45 provided that

"In all cases of the appointment of interpreters or other persons employed for the benefit of Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties."

and Section 472 provides that

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Prior to June, 1972 these laws, as well as the other "Indian Preference" laws were uniformly interpreted to mean that Indians would enjoy a preference for initial

appointments in the Federal Civil Service. This preference was considered fair and reasonable in that it provided opportunities that might not otherwise exist, for disadvantaged Indians to enter the Federal Service. Since all subsequent personnel actions, were strictly governed by the merit principle it was thought that the merit-based civil service system was not threatened by those non-competitive initial appointments.

In June, 1972 the Secretary of Interior determined that above reference Indian Preference laws mandated an absolute Indian Preference to all vacancies whether that vacancy was an initial appointment, a promotion or a transfer. This radical departure, coupled with a lack of provision for non-Indian employees of the Bureau of Indian Affairs, caused massive upheavals within the Bureau and plummeting morale amongst some Indian and especially non-Indian employees. Consideration was not given to the retroactive effect this change would have on the careers of non-Indian employees or the effect of this decision upon the merit principle and equal opportunity.

ARGUMENT

I.

THE PRESENT INTERPRETATION OF THE INDIAN PREFERENCE LAWS IS CONTRARY TO THE INTENT OF THOSE LAWS.

The key to the interpretation of the Indian Preference laws and the interest of the Congress lies in the word "appointment." Section 45 provides that "In all cases of *appointments* . . . a preference shall be given . . . (To Indians) and Section 472 similarly provides that " . . . Indians . . . may be appointment with-

out regard to the Civil Service Law, to the various positions maintained... (and they)... shall... have the preference to appoint to vacancies in any such positions."

The word appointment has a specific meaning and it must be presumed that the Congress when it passed the Indian Preference laws was aware of that meaning. The meaning of the word may be derived from the Civil Service laws of the United States.

5 U.S.C. 3304(b) provides that "an individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted..." 5 U.S.C. 3306(a) provides that "the President may prescribe rules which shall provide... that appointments in the departmental service... be apportioned..." and Section 3303 provides that "an individual concerned in examining an applicant for or appointing him in the competitive service may not receive... a recommendation (from a member of Congress)." Perhaps more to the point is 5 U.S.C. 3312 which deals with Veterans' Preference. It provides that "In determining qualifications of a Preference eligible for examination for, appointment in... the competitive service, the Civil Service Commission shall waive... (certain requirements)."

In the context of the above laws, it is clear that the word appointment refers only to entrance in, or initial appointment to the competitive service. That this is the correct interpretation is demonstrated by 5 U.S.C. 3317, which provides that

"The Civil Service Commission shall certify enough names from the top of the appropriate register to permit a nominating or appointing authority who has requested a certificate of

eligibles to consider at least three names for appointment to each vacancy in the competitive service."

and Section 3316 provides that

"A preference eligible who has resigned or who has been dismissed or furloughed may be certified for, and appointed to, a position for which he is eligible in the competitive service."

Finally, 5 U.S.C. 2105(a)(1) defines an employee as an individual who is "appointed in the Civil Service. . ."

A fortiori, before any individual is eligible for either a transfer or a promotion in the competitive service, he must first be a member of the competitive service. Thus, it is clear that when the various "civil service" laws refer to an "appointment" in the Competitive service, that reference must necessarily relate only to entrance into the competitive service. That the Congress intended to distinguish between appointments in the competitive service and promotions and transfer is shown by the treatment accorded these matters. Each topic is covered in separate chapter; nowhere that we have discovered does the Congress equate either a transfer or a promotion to an appointment.

By analogy to identical words in the Civil Service laws the words "position" and "vacancy" found in the various Indian Preference laws cannot have the same meaning as the word "appointment". The words "position" and "vacancy" are modified by the word "appointment" thus, the phrase that "... Indians shall ... have preference to appointment to vacancies in any ... position." (5 U.S.C. 472) must mean, when read in the context of the Civil Service laws, that Indians shall have a preference for initial appointment to vacancies in any position in the competitive service.

Any other interpretation would have the effect of equating a promotion with an appointment.

The implementation of the Indian Preference Policy promulgated by the Secretary of Interior in June, 1972 is contrary to the Civil Service laws of the United States. The retroactivity of the new interpretation denies all current non-Indian employees promotional opportunities based on merit.

5 U.S.C. 3361 provides that "an individual may be promoted in the competitive service only if he has passed an examination..."

The clear effect of the retroactive application of the Indian Preference Policy is to destroy promotional opportunities for non-Indians since regardless of the results of any "examination" or other criteria all promotions are subjected to the preference.

II.

THE EQUAL OPPORTUNITY ACT OF 1972 PROHIBITS PREFERENCE BEYOND INITIAL APPOINTMENT.

Section 717(a) of the Equal Opportunity Act of 1972 provides that "all personnel actions affecting employees or applicants for employment... shall be made free from any discrimination based on race, or... National origin.

Section 717 does not provide for specific exceptions for Indian Preference. That the Congress considered the question of exceptions to the Act is, however, demonstrated by Section 712 which excepts "...special rights or preference for Veterans" from the Act.

The question of Indian Preference was also considered by the Congress. Section 703(i) provides

with respect to private employers that "(n)othing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publically announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

The Congress, therefore, considered the question of preference and chose not to exempt Indians from full coverage of the Act. Neither, however, did the Congress specifically rule out the possibility of some form of preference. The fact that the Congress did not specifically prohibit Indian Preference and allowed for a preference in private employment indicates that the Congress did not intend to prohibit all forms of preference for Indians. However, if implemented the Indian Preference Policy is contrary to the Equal Opportunity Act of 1972, because the retroactive application of the policy discriminates against and denies promotional opportunities to non-Indian employees solely on the basis of race.

III.

INDIAN PREFERENCE, THE CIVIL SERVICE LAWS AND THE EQUAL OPPORTUNITY ACT OF 1972 ARE RECONCILABLE.

Indians have traditionally enjoyed a special status. That status represents an obligation to our first citizens and ought not be disturbed providing that the overriding public interest in an effective Civil Service based on the merit principle and the national commitment to equal opportunity are not violated or seriously compromised. We submit that justice to

Indians and preservation of other national policies are reconcilable by the following actions.

1. Indian Preference, as it relates to promotions and transfers should not apply to current non-Indian employees.

2. All incoming non-Indian employees could reasonably be subjected to the policy through a contractual device.

3. Non-Indian employees who voluntarily agree to be subjected to the Indian Preference Policy should be guaranteed the right to transfer to a job in the Department of Interior that has promotional opportunities commensurate with the job being vacated in the Bureau of Indian Affairs.

CONCLUSION

Indians are entitled to a Preference in initial appointment. They may also be entitled to a preference in promotions and transfers providing promotional opportunities and transfers for current employees are not jeopardized. However, without adequate safeguards for current employees the Indian Preference Policy, as implemented, violates the Civil Service laws and the Equal Opportunity Act of 1972.

The illegality of the policy may, however, be cured. The illegality lies not in the policy, but in the retroactive application of the policy. As implemented it denies current Federal employees of their promotional and equal opportunity rights. We believe, however, that the alternatives proposed by us resolve the present

illegality of the Indian Preference Policy without undue interference with the legitimate aims of the policy.

Respectfully submitted,

IRVING I. GELLER

1737 H Street, N.W.

Washington, D.C. 20006

Attorney for Amicus Curiae

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 327.

SUPREME COURT OF THE UNITED STATES

Syllabus

MORTON, SECRETARY OF THE INTERIOR, ET AL. v. MANCARI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW MEXICO

No. 73-362. Argued April 24, 1974—Decided June 17, 1974*

Appellees, non-Indian employees of the Bureau of Indian Affairs (BIA), brought this class action claiming that the employment preference for qualified Indians in the BIA provided by the Indian Reorganization Act of 1934 contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972, and deprived them of property rights without due process of law in violation of the Fifth Amendment. A three-judge District Court held that the Indian preference was implicitly repealed by § 11 of the 1972 Act proscribing racial discrimination in most federal employment, and enjoined appellant federal officials from implementing any Indian employment preference policy in the BIA. *Held*:

1. Congress did not intend to repeal the Indian preference, and the District Court erred in holding that it was repealed by the 1972 Act. Pp. 9-16.

(a) Since in extending general anti-discrimination machinery to federal employment in 1972, Congress in no way modified and thus reaffirmed the preferences accorded Indians by §§ 701 (b) and 703 (i) of Title VII of the Civil Rights Act of 1964 for employment by Indian tribes or by private industries located on or near Indian reservations, it would be anomalous to conclude that Congress intended to eliminate the longstanding Indian preferences in BIA employment, as being racially discriminatory. Pp. 12-13.

(b) In view of the fact that shortly after it passed the 1972

*Together with No. 73-364, *Amerind v. Mancari et al.*, also on appeal to the same court.

Syllabus

Act Congress enacted *new* Indian preference laws as part of the Education Amendments of 1972, giving Indians preference in Government programs for training teachers of Indian children, it is improbable that the same Congress condemned the BIA preference as racially discriminatory. P. 13.

(c) The 1972 extension of the Civil Rights Act to Government employment being largely just a codification of prior anti-discrimination Executive Orders, with respect to which Indian preferences had long been treated as exceptions, there is no reason to presume that Congress affirmatively intended to erase such preferences Pp. 13-14.

(d) This is a prototypical case where an adjudication of repeal by implication is not appropriate, since the Indian preference is a longstanding, important component of the Government's Indian program, whereas the 1972 anti-discrimination provisions, being aimed at alleviating minority discrimination in employment, are designed to deal with an entirely different problem. The two statutes, thus not being irreconcilable, are capable of co-existence, since the Indian preference, as a specific statute applying to a specific situation, is not controlled or nullified by the general provisions of the 1972 Act. Pp. 14-15.

2. The Indian preference does not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment but is reasonable and rationally designed to further Indian self-government. Pp. 16-20.

(a) If Indian preference laws, which were derived from historical relationships and are explicitly designed to help only Indians, were deemed invidious racial discrimination, 25 U. S. C. in its entirety would be effectively erased and the Government's commitment to Indians would be jeopardized. Pp. 16-17.

(b) The Indian preference does not constitute "racial discrimination" or even "racial" preference, but is rather an employment criterion designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. Pp. 18-19.

(c) As long as the special treatment of Indians can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed. Pp. 19-20.

350 F. Supp. 585, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 73-362 AND 73-364

Rogers C. B. Morton, Secretary of the Interior, et al.,

Appellants,

73-362

v.

C. R. Mancari et al.

Amerind, Appellant,

73-364

v.

C. R. Mancari et al.

On Appeals from the United States District Court for the District of New Mexico.

[June 17, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Indian Reorganization Act of 1934 accords an employment preference for qualified Indians in the Bureau of Indian Affairs [BIA]. Appellees, non-Indian BIA employees, challenged this preference as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972, and as violative of the Due Process Clause of the Fifth Amendment. A three-judge federal district court concluded that the Indian preference under the 1934 Act was impliedly repealed by the 1972 Act. *Mancari v. Morton*, 359 F. Supp. 585 (N. M. 1973). We noted probable jurisdiction in order to examine the statutory and constitutional validity of this longstanding Indian preference. 414 U. S. 1142 (1974).

I

Section 12 of the Indian Reorganization Act, also known as the Wheeler-Howard Act, 48 Stat. 986 (1934), 25 U. S. C. § 472, provides:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office,¹ in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."²

In June 1972, pursuant to this provision, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a directive (Personnel Management Letter No. 72-12) stating that the BIA's policy would be to grant a preference to qualified Indians not only, as before, in the initial hiring stage, but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau.³ The record indicates that this policy was implemented immediately.

¹ The Indian Health Service was transferred in 1954 from the Department of the Interior to the Department of Health, Education, and Welfare. Act of August 5, 1954, § 1, 68 Stat. 674, 42 U. S. C. § 2001. Presumably, despite this transfer, the reference in § 12 to the "Indian Office" has continuing application to the Indian Health Service. See 5 CFR § 213.3116 (b) (8) (1974).

² There are earlier and more narrowly drawn Indian preference statutes. 25 U. S. C. §§ 44, 45, 46, 47, and 274. For all practical purposes, these were replaced by the broader preference of § 12. Although not directly challenged in this litigation, these statutes, under the District Court's decision, clearly would be invalidated.

[Footnote 3 is on p. 3]

Shortly thereafter, appellees, who are non-Indian employees of the BIA at Albuquerque,³ instituted this class action, on behalf of themselves and other non-Indian employees similarly situated, in the United States District Court for the District of New Mexico, claiming that the "so-called 'Indian Preference Statutes'" were repealed by the 1972 Equal Employment Opportunity Act and deprived them of rights to property without due process of law, in violation of the Fifth Amendment.⁴ Named as defendants were the Secretary of the Interior,

³ The directive stated:

"The Secretary of the Interior announced today [June 23, 1972] he has approved the Bureau's policy to extend Indian preference to training and to filling vacancies by original appointment, reinstatement, and promotion. The new policy was discussed with the national president of the National Federation of Federal Employees under national consultation rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This new policy is effective immediately and is incorporated into all existing programs such as the promotion program. Revised manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions of this policy."

⁴ The appellees state that none of them is employed on or near an Indian reservation. Brief for Appellees 8. The District Court described the appellees as "teachers . . . or programmers, or in computer work." *Mancari v. Morton*, 350 F. Supp. 585, 587 (N. M. 1973).

⁵ The specific question whether § 12 of the 1934 Act authorizes a preference in promotion as well as in initial hiring was not decided by the District Court and is not now before us. We express no opinion on this issue. See *Freeman v. Morton*, — U. S. App. D. C. —, — F. 2d — (1974). See also *Mescalero Apache Tribe v. Hickel*, 432 F. 2d 956 (CA10 1970), cert. denied, 401 U. S. 981 (1971) (preference held inapplicable to reduction in force).

the Commissioner of Indian Affairs, and the BIA Directors for the Albuquerque and Navajo Area Offices. Appellees claimed that implementation and enforcement of the new preference policy "placed and will continue to place [appellees] at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the [appellees] to discrimination and deny them equal employment opportunity."

A three-judge court was convened pursuant to 28 U. S. C. § 2282 because the complaint sought to enjoin, as unconstitutional, the enforcement of a federal statute. Appellant Amerind, a nonprofit organization representing Indian employees of the BIA, moved to intervene in support of the preference; this motion was granted by the District Court and Amerind thereafter participated at all stages of the litigation.

After a short trial focusing primarily on how the new policy, in fact, has been implemented, the District Court concluded that the Indian preference was implicitly repealed by § 11 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 111, 42 U. S. C. (Supp. II 1973) § 2000e-16 (a), proscribing discrimination in most federal employment on the basis of race.*

* Section 2000e-16 (a) reads:

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library

Having found that Congress repealed the preference, it was unnecessary for the District Court to pass on its constitutionality. The court permanently enjoined appellants "from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian." The execution and enforcement of the judgment of the District Court was stayed by MR. JUSTICE MARSHALL on August 16, 1973, pending the disposition of this appeal.

II

The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834.¹ Since that time, Congress repeatedly has enacted various preferences of the general type here at issue.² The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-

of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

¹ Act of June 30, 1834, § 9, 4 Stat. 737, 25 U. S. C. § 45:

"In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties."

² Act of May 17, 1882, § 6, 22 Stat. 88, and Act of July 4, 1884, § 6, 23 Stat. 97, 25 U. S. C. § 46 (employment of clerical, mechanical, and other help on reservations and about agencies); Act of August 15, 1894, § 10, 28 Stat. 313, 25 U. S. C. § 44 (employment of herders, teamsters, and laborers, "and where practicable in all other employments" in the Indian service); Act of June 7, 1897, § 1, 30 Stat. 83, 25 U. S. C. § 274 (employment as matrons, farmers, and industrial teachers in Indian schools); Act of June 25, 1910, § 23, 36 Stat. 861, 25 U. S. C. § 47 (general preference as to Indian labor and products of Indian industry).

government; ⁹ to further the Government's trust obligation toward the Indian tribes; ¹⁰ and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.¹¹

The preference directly at issue here was enacted as an important part of the sweeping Indian Reorganization Act of 1934. The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.¹² Congress was

⁹ Senator Wheeler, co-sponsor of the 1934 Act, explained the need for a preference as follows:

"We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States because these Indians own this property. It belongs to them. What this policy of this Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service is concerned" Hearings before the Senate Committee on Indian Affairs on S. 2755 and S. 3645 (Part 2), 73d Cong., 2d Sess., 256 (1934).

¹⁰ A letter, contained in the House Report to the 1934 Act, from President F. D. Roosevelt to Congressman Howard states:

"We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection." H. R. Rep. No. 1804, 73d Cong., 2d Sess., 8 (1934).

¹¹ "If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men." H. R. Rep. No. 474, 23d Cong., 1st Sess., 98 (1834) (letter dated February 10, 1834, from Indian Commissioners to the Secretary of War).

¹² As explained by John Collier, Commissioner of Indian Affairs:

"[T]his bill is designed not to prevent the absorption of Indians in

seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes. Initial congressional proposals would have diminished substantially the role of the BIA by turning over to federally chartered self-governing Indian communities many of the functions normally performed by the Bureau.¹³ Committee sentiment, however, ran against such a radical change in the role of the BIA.¹⁴ The solution ultimately adopted was to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve.

One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations.¹⁵ In order to achieve this end, it was recognized that some kind of preference and exemption from otherwise prevailing civil service requirements

white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measures of self-government in their own affairs." Hearings on S. 2755 before the Senate Committee on Indian Affairs (Part 1), 73d Cong., 2d Sess., 26 (1934).

¹³ Hearings before the House Committee on Indian Affairs on H. R. 7902, Readjustment of Indian Affairs, 73d Cong., 2d Sess., 1-7 1934 [House Hearings]. See also *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 152-153, fn. 9 (1973).

¹⁴ House Hearings 491-497.

¹⁵ "[Section 12] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian" (footnote omitted). *Mescalero Apache Tribe v. Hickel*, 432 F. 2d, at 960.

was necessary.¹⁶ Congressman Howard, the House sponsor, expressed the need for the preference:

"The Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil service. In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions; and even if there were such training, the Indians would have to compete under existing law, on equal terms with multitudes of white applicants The various services on the Indian reservations are actually local rather than Federal services and are comparable to local municipal and county services, since they are dealing with purely local Indian problems. It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so." 78 Cong. Rec. 11729 (1934).

Congress was well aware that the proposed preference would result in employment disadvantages within the

¹⁶ "The bill admits qualified Indians to the position [sic] in their own service.

"Thirty-four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total of positions, was greater than it is today.

"The reason primarily is found in the application of the generalized civil service to the Indian Service, and the consequent exclusion of Indians from their own jobs." House Hearings 19 (Memorandum dated February 19, 1934, submitted by Commissioner Collier to the Senate and House Committees on Indian Affairs).

BIA for non-Indians.¹⁷ Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-government.¹⁸ Since 1934, the BIA has implemented the preference with a fair degree of success. The percentage of Indians employed in the Bureau rose from 34% in 1934 to 57% in 1972. This reversed the former downward trend, see n. 16, *supra*, and was due, clearly, to the presence of the 1934 Act. The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent. See *Freeman v. Morton*, *supra*, and n. 5, *supra*.

III

It is against this background that we encounter the first issue in the present case: whether the Indian preference was repealed by the Equal Employment Opportunity Act of 1972. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, was the first major piece of federal

¹⁷ Rep. Carter, an opponent of the bill, placed in the Congressional Record the following observation by Commissioner Collier at the Committee Hearings:

"[W]e must not blind ourselves to the fact that the effect of this bill if worked out would unquestionably be to replace white employees by Indian employees. I do not know how fast, but ultimately it ought to go very far indeed." 78 Cong. Rec. 11737 (1934).

¹⁸ "It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians." 78 Cong. Rec. 11731 (1934) (remarks of Rep. Howard).

legislation prohibiting discrimination in *private* employment on the basis of "race, color, religion, sex, or national origin." 42 U. S. C. § 20000e-2 (a). Significantly, §§ 701 (b) and 703 (i) of that Act explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations. 42 U. S. C. §§ 2000e (b) and 2000e-2 (i).¹⁹ This exemption reveals a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities. The Senate sponsor, Senator Humphrey, stated on the floor by way of explanation:

"This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. 12723 (1964).²⁰

The 1964 Act did not specifically outlaw employment discrimination by the federal government.²¹ Yet the

¹⁹ Section 2000e (b) excludes "an Indian Tribe" from the Act's definition of "employer." Section 2000e-2 (i) states:

"Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

²⁰ Senator Mundt supported these exemptions on the Senate floor by claiming that they would allow Indians "to benefit from Indian preference programs now in operation or later to be instituted." 110 Cong. Rec. 13702 (1964).

²¹ The 1964 Act, however, did contain a proviso, expressed in somewhat precatory language:

"That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin." 78 Stat. 254.

This statement of policy was reenacted as 5 U. S. C. § 7151, 80 Stat. 523 (1966), and the 1964 Act's proviso was repealed, *id.*, at 662.

mechanism for enforcing long-outstanding Executive Orders forbidding government discrimination had proved ineffective for the most part.²² In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and proscribed discrimination in most areas of federal government. See n. 6, *supra*. In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government. As stated in the House Report,

"To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly." H. R. Rep. No. 92-238, on H. R. 1746, 92d Cong., 1st Sess. 24-25 (1971).

Nowhere in the legislative history of the 1972 Act, however, is there any mention of Indian preference.

Appellees assert, and the District Court held, that since the 1972 Act proscribed racial discrimination in government employment, the Act necessarily, albeit *sub silentio*, repealed the provision of the 1934 Act, that

²² "This disproportionate [sic] distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.

"A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment." H. R. Rep. No. 92-238, on H. R. 1746, 92d Cong., 1st Sess., 23-24 (1971).

called for the preference in the BIA of one racial group, Indians, over non-Indians:

"When a conflict such as in this case, is present, the most recent law or Act should apply and the conflicting Preferences passed some 39 years earlier should be impliedly repealed." Brief for Appellees 7.

We disagree. For several reasons we conclude that Congress did not intend to repeal the Indian preference and that the District Court erred in holding that it was repealed.

First: There are the above-mentioned affirmative provisions in the 1964 Act excluding coverage of tribal employment and of preferential treatment by a business or enterprise on or near a reservation. 42 U.S.C. §§ 2000e (b) and 2000e-2 (i). See n. 19, *supra*. These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or "on or near" reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. In extending the general anti-discrimination machinery to federal employment in 1972, Congress in no way modified these private employment preferences built into the 1964 Act, and they are still in effect. It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference. Appellees' assertion that Congress implicitly repealed the preference as racially discriminatory, while

retaining the 1964 preferences, attributes to Congress irrationality and arbitrariness, an attribution we do not share.

Second: Three months after Congress passed the 1972 amendments, it enacted two new Indian preference laws. These were part of the Education Amendments of 1972, 86 Stat. 235, 20 U. S. C. (Supp. II 1973) §§ 887c (a) and (d), and § 1119a. The new laws explicitly require that Indians be given preference in government programs for training teachers of Indian children. It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, condemning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

Third: Indian preferences, for many years, have been treated as exceptions to Executive Orders forbidding government employment discrimination.²³ The 1972 extension of the Civil Rights Act to government employment is in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery. There certainly was no indication that the substantive

²³ See, e. g., Ex. Order 7423, July 26, 1936, 1 Fed. Reg. 885-886. When President Eisenhower issued an Order prohibiting discrimination on the basis of race in the civil service, Exec. Order 10577, No. 22, 1954, 19 Fed. Reg. 7521, § 4.2, he left standing earlier Executive Orders containing exceptions for the Indian service. *Id.*, § 301. See also 5 CFR § 213.3112 (a)(7) (1974), which provides a civil service exemption for:

"All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood."

See also 5 CFR § 213.3116 (b)(8) (1974) (Indian Health Services).

proscription against discrimination was intended to be any broader than that which previously existed. By codifying the existing anti-discrimination provisions, and by providing enforcement machinery for them, there is no reason to presume that Congress affirmatively intended to erase the preferences that previously had co-existed with broad anti-discrimination provisions in Executive Orders.

Fourth: Appellees encounter head-on the "cardinal rule . . . that repeals by implication are not favored." *Posedas v. National City Bank*, 296 U. S. 497, 503 (1963); *Wood v. United States*, 16 Pet. 342-343, 363 (1842); *Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U. S. 186, 193 (1968). They and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. Indeed, as explained above, there is ample independent evidence that the legislative intent was to the contrary.

This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 456-457 (1945). Clearly, this is not the

case here. A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians.

Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. See, *e. g.*, *Bulova Watch Co. v. United States*, 365 U. S. 753, 758 (1961); *Rodgers v. United States*, 185 U. S. 83, 87-89 (1902).

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U. S. 188, 198 (1939). In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments.

We therefore hold that the District Court erred in ruling that the Indian preference was repealed by the 1972 Act.

IV

We still must decide whether, as the appellees contend, the preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U. S. 497 (1954). The District Court, while pretermittting this issue, said, "[W]e could well hold that the statute must fail on constitutional grounds." 359 F. Supp., at 591.

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally-recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The Court has described the origin and nature of the special relationship:

"In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independ-

ent, qualified members of the modern body politic." *Board of County Comm'rs v. Seber*, 318 U. S. 705, 715 (1943).

See also *United States v. Kagama*, 118 U. S. 375, 383-384 (1886).

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. See *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 n. 13 (ED Wash. 1965), *aff'd*, 384 U. S. 209 (1966).

It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined. As discussed above, Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests. Congress was united in the belief that institutional changes were required. An important part of the Indian Reorganization Act was the preference provision here at issue.

Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference.²⁴

²⁴ The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who

Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. See n. 24, *supra*. In the sense that there is no

are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature. The eligibility criteria appear in 44 BIAM 335, 3.1:

"1 Policy—An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau.

"This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may be filled by transfers, reassignment, reinstatement, or initial appointment." App. 92.

other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.²² Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. See, e. g., *Board of County Comm'rs v. Seber*, 318 U. S. 705 (1943) (federally granted tax immunity); *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164 (1973) (same); *Simmons v. Eagle Seelatsee*, 384 U. S. 209 (1966), affirming, 244 F. Supp. 808 (ED Wash. 1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams v. Lee*, 358 U. S. 217 (1959) (tribal courts and their jurisdiction over reservation affairs). Cf. *Morton v. Ruiz*, — U. S. — (1974) (federal welfare benefits for Indians "on or near" reservations). This unique legal status is of long standing, see *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831); *Worcester v. Georgia*, 6 Pet. 515 (1832), and its sources are diverse. See, generally, U. S. Dept. of Interior, *Federal Indian Law* (1958); Comment, *The Indian Battle for Self-Determination*, 58 Cal. L. Rev. 445 (1970). As long as the special treatment can be tied rationally to the fulfillment

²² Senator Wheeler described the BIA as "an entirely different service from anything else in the United States." Hearings before the Senate Committee on Indian Affairs on S. 2755 and S. 3645 (Part 2), 73d Cong., 2d Sess., 256 (1934).

of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.